E. Rockwood Hoar
1845.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE FIRST CIRCUIT.

By CHARLES SUMNER,

REPORTER OF THE COURT.

Nihil est quicquam in jure, quod ad usum Causidici seu Jurisperiti non conducat, quodque vel ad rem ipsam, si non ad rem ipsam, at in exemplum, si non in exemplum, saltem in argumentum, trahi valeat.

PARLEDORIUS, *Epist.* I. *ad Filios*, § 16.

VOLUME I.

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CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1829, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

GEORGE SULLIVAN AND WIFE

v.

THOMAS L. WINTHROP AND OTHERS.

Interest commences on a pecuniary legacy at the expiration of one year from the decease of the testator, whatever may be the posture of the estate, unless some other period is specified in the will.

The cases of infant children not otherwise provided for, and of adopted children under age, not otherwise provided for, are exceptions to the general rule.

Executors may at their discretion pay over legacies at any time within the year.

Where the executors invested certain sums, less than the whole amount of the legacy, in the name of the legatee; *held*, that this was a payment of the legacy *pro tanto*, and that the interest accruing upon these sums, within the year from the time of such investment, belonged to the legatee.

BILL in Equity, the object of which was to ascertain the right of the plaintiffs to interest on a legacy of 20,000 dollars, bequeathed her by the will of Mrs. Sarah B. Dearborn. There being no important facts in dispute between the parties, the cause was set down for a hearing by consent upon the bill and answers, and was argued by *William Sullivan* for the plaintiffs, and by *Hubbard* for the defendants.

The bill was in substance as follows: — That Mrs. Sarah Bowdoin, while she was the wife of the late James Bowdoin, Esq., did, with his consent, adopt Sarah B. Sullivan, one of the complainants, as her child from an early age, and educated and maintained her as such, until the time of her marriage with said George; and continued to treat said complainant as her child up to the time of her own decease. That on the 18th of July, 1812, said Sarah Bowdoin, being a widow and having a large real and personal estate, made her will. That on the 10th of November, 1813, Mrs. Bowdoin, in contemplation of marriage with Henry Dearborn, Esq., entered into articles of agreement, which provided among other things, that the will of Mrs. Bowdoin should not be revoked by the marriage. That the marriage was solemnized on the same *10th day of November*, and that the testatrix Mrs. Dearborn died on the 23d day of May, 1826, and that her will was proved on the 12th day of June following (Thomas L. Winthrop and Richard Sullivan, Esqs., the respondents, being the executors, and being trustees of $20,000 given by the will to Mrs. Sarah B. Sullivan.) That in the month of July, 1826, the complainant, George Sullivan, asked payment of the executors and trustees of the interest on $20,000, and on the 25th of July $600 were paid, for which a receipt was given in these terms. "Received of Thomas L. Winthrop and Richard Sullivan, Esqs., trustees of Mrs. Sarah B. Sullivan, my wife, the sum of six hundred dollars to be charged in account as interest money on the fund bequeathed to Mrs. Sullivan by the late Mrs. Dearborn. New York, 25 July, 1826. George Sullivan." That in August, September, and November, 1826, Messrs. Winthrop and Sullivan, the defendants, as trustees under the will, invested in mortgage and otherwise $20,000 in trust for Sarah B. Sullivan; and that the same trustees received the interest

and income of the funds from which that investment was made from the testatrix's decease to the time of such investment and ever since. That the complainants had demanded the interest on said $ 20,000 from the time of the decease of the testatrix, but the trustees had declined paying it, because James Bowdoin, the residuary legatee, claimed to have the whole income and interest of the testatrix's estate for the year following her decease. The complainants charged that the intention of the testatrix was, that the said Sarah B. Sullivan should have the income of said $ 20,000 from the time of her decease, and that the trustees, and the said residuary legatee, knew this to be her intention. That the executors paid the legacies given by the will, within the year following the testatrix's decease, and did assent to the execution of the will, by making the investment to the use of the complainants, and paying a part of the interest within the year.

The answers of the defendants were made separately, and admitted the principal facts stated in the bill; not admitting, however, that Mrs. Sarah B. Sullivan was ever formally adopted by the testatrix as her child, or that it was intended by the payment of the $600 to the complainants to decide on the right of the residuary legatee; — as evidence of which the following receipt was introduced:

"Boston, Nov. 17, 1826. Received of the executors of the last will of the late Mrs. Sarah Bowdoin Dearborn, deceased, $ 472·67, which sum, with $ 600 received in July last, appears to be the amount of interest to the 24th Nov. inst. on the two legacies of $ 20,000 each, bequeathed by Mrs. Dearborn to my wife, Sarah Bowdoin, and my son, James Bowdoin; and I hereby promise and agree, that if it be found on investigation that the legatees abovenamed are not legally entitled to interest as paid over from the day of the decease of the testatrix, and Mr. Webster should so decide, in such

event I hereby authorize the said executors, who are also trustees to the abovenamed legatees, to deduct the aforementioned sums of $600 and $472·67 from the interest money now accruing on sums invested, or which may hereafter accrue, when the said legacies shall be fully placed on interest, or any part of said sums according to law, or as said Webster shall decide may be. (Signed) George Sullivan."

The clause in the will of Mrs. Dearborn, giving the said $ 20,000 to Mrs. Sarah B. Sullivan, appears in the opinion of the Court.

The marriage articles, referred to in the bill, recite among other things, that Sarah Bowdoin "had conveyed and transferred all her property, real and personal, unto Thomas L. Winthrop and Richard Sullivan, in trust; to pay over the income and interest to her use during coverture, and in case said Henry Dearborn shall survive said Sarah, *then forthwith upon her decease*, to convey and transfer the same, by good and sufficient instruments of conveyance, to such person or persons as she may have appointed, and to whom she may have devised the same, by her last will and testament," "such will to be construed according to the most obvious meaning and intent, as expressed therein, without regard to technical or formal inaccuracies therein."

William Sullivan, for the complainants, contended

(1.) That the will and the marriage articles were to be taken together, and constituted but one instrument. That the will provided *who* should take, and *how much;* and the articles provided *when* the bounty should be taken. That the will would have been revoked by the marriage, if not protected by the articles. That in consequence of the marriage contract the will became a testamentary appointment by a *feme covert*, and its validity and effectiveness depended upon the articles.

That the respondents, Messrs. Winthrop and Sullivan, were to be regarded in relation to this matter solely in the light of trustees, and not as executors. They were not called upon in this suit to execute a will, but to perform a trust. *Middleton* v. *Crofts*, 2 Atk. 661; *Southby* v. *Stonehouse*, 2 Ves. 611; Sugden on Powers, 331; *Bradish* v. *Gibbs*, 3 John. Chanc. R. 548; *Osgood* v. *Breed*, 12 Mass. R. 525.

That if the will and the marriage articles were so to be taken together as contended for, then the only question was *when* the bounty should be enjoyed, and this was repeatedly provided for in the articles. Besides which the condition of the estate (the whole being invested and productive); the relations which the parties sustained to each other; the absence of all claims on the estate which could impede an immediate distribution and settlement, show conclusively the intention of the parties who had the power to order a disposal.

That the respondents (trustees) show by their conduct, that they thus understood the intentions of Mrs. Dearborn. They paid the legacies generally within the year. They made investments within the year to the use of Mr. Sullivan, the complainant; and if they were to be considered merely in the light of executors, they thus assented to the claim of the complainants, and could not now retract that assent. 1 Roper on Legacies, 505.

(2.) That, although it was admitted to be the general rule of law, that executors shall be allowed one year in which to pay pecuniary legacies, and that interest was to commence from the end of that year, still it was contended that this rule was made solely for the protection of executors, and the general benefit of the estate administered upon, to protect executors from improvident and erroneous payments, to enable them to obtain a competent knowledge of the situation of the property, to pay off debts and effect abatements if the assets

were deficient. That it was a rule which the executors might waive if they thought fit, and that it was their duty so to waive it whenever an immediate settlement and distribution could be effected. That it was neither equitable nor reasonable that a rule, made for the protection of executors and the benefit equally of all persons interested in an estate, should be so applied by the executors, without any necessity on their part, as to benefit the residuary legatee at the expense of all the other legatees. But, however general might be the application of this rule when no time of payment was fixed by the testator, yet when his intentions on this point were plainly expressed or could be satisfactorily inferred, and the rights and convenience of the executors admitted of their observance, they must govern.

That, in the case before the Court, such was the situation of the property that it might be immediately and conveniently distributed; and the condition of the estate, the relation of the parties to each other, and the acts of the executors plainly indicated what was considered to be the intention of the testatrix. But if the marriage articles were to be received as explanatory of the will, then the intention of the testatrix was fully expressed by the terms, "*forthwith upon Mrs. Bowdoin's decease.*" *Sitwell* v. *Barnard*, 6 Ves. Jun. 539; *Entwistle* v. *Markland*, 6 Ves. Jun. 528; *Stuart* v. *Bruere*, 6 Ves. Jun. 529; *Fearn* v. *Young*, 9 Ves. Jun. 549; *Gibson* v. *Bott*, 7 Ves. Jun. 89; *Hutchin* v. *Mannington*, 1 Ves. Jun. 366.

That, in connexion with these circumstances, the particular relationship which the complainant, Mrs. Sullivan, bore to the testatrix was to be taken into consideration, as presenting a substantial reason for the intention of the testatrix, that the legacy left to her should bear interest from the time of the testatrix's decease.

It was further contended by Mr. *Sullivan* that this bequest, under the circumstances, might be considered an annuity, in which case a year's interest would be payable to the annuitant at the expiration of one year from the decease of the testatrix.

Hubbard, for the respondents, contended,

That the law was perfectly settled, that where a legacy is given generally out of the personal estate, and no time specified for the payment of it by the testator, it was not payable until the end of a year from the death of the testator, and that interest was not to be allowed upon it until after that period. *Bird* v. *Lockey*, 2 Vern. 745; *Smell* v. *Dee*, 2 Salk. 415; *Bilson* v. *Sanders*, Bunb. 240; *Maxwell* v. *Wittenhall*, 2 P. Williams, 26; *Lloyd* v. *Williams*, 2 Atk. 109; *Beckford* v. *Tobin*, 1 Ves. 310; *Hutchin* v. *Mannington*, 1 Ves. Jun. 366; *Bourke* v. *Ricketts*, 10 Ves. Jun. 333; *Wood* v. *Penoyre*, 13 Ves. Jun. 326; *Pearson* v. *Pearson*, 1 Sch. & Lefr. 10; *Eyre* v. *Goulding*, 5 Binn. 475; *Shobe* v. *Carr*, 3 Munf. 10; *Lupten* v. *Lupten*, 2 John. Ch. 628; *Van Bramer* v. *Hoffman*, 2 John. Cases, 200.

That, this general principle being clear, the question was whether there was any thing in the case at bar to exempt it from the operation of the principle.

That this was not an annuity, but a general devise of a sum of money to be laid out in a particular manner. That it was a legacy by the terms of it, and the trust was to cease on the death of the husband, when the widow and her children might spend the principal immediately if they pleased. Chief Justice *Tilghman* says, in *Eyre* v. *Golding*, 5 Bin. 475, "There is a difference between a legacy of a sum of money to one for term of life, and a bequest of a sum to be paid *annually* for life. In the former case, the legacy, not being payable till the end of a year from the testator's death,

carries no interest for that year; but in the latter, the first payment of the annuity must be made at the end of the first year."

That no intention of the testatrix, that interest should be paid on this legacy from the time of her decease, could be fairly inferred from any expressions used in the marriage articles.

That there was nothing in the case to prove that Mrs. Sarah B. Sullivan was an adopted daughter of the testatrix, legally speaking; nor could the reason, which governs the payment of interest to a child, upon a legacy from its parent, during the first year after the parent's decease, be applied in this case, *viz.* the obligation of the parent to support the child. The complainant in this instance was married long before the decease of the testatrix, and was living entirely independent of her.

That no assent of the executors to the payment of interest could be inferred, taking all the circumstances of the case into view, nor would such an assent now avail the complainants.

Story J. On the 18th of July, 1812, Mrs. Sarah Bowdoin made her will, and, among other bequests, made the following:

"I give and devise to my beloved, affectionate, worthy *niece*, Mrs. Sarah Bowdoin Sullivan, wife of George Sullivan, Esq., of &c. (who are the plaintiffs), for and during her natural life all my real estate in Milk Street, &c.; and at her death I give the said estate to her second son, James Bowdoin Sullivan, &c. &c." "I give and devise to Thomas L. Winthrop, Esq., and Richard Sullivan, Esq., of &c. (who are named executors of her will), and their heirs, in trust, for my said affectionate niece, Mrs. Sarah Bowdoin

Sullivan, the sum of 20,000 dollars, to her and her children for ever. It is not for want of regard or attachment to George Sullivan, Esq., husband to my said niece, that I give the said 20,000 dollars in trust for her during her marriage state, but only on account of the uncertainty of all human events; therefore it is intended as friendship to him, as well as to his said wife." The testatrix then proceeds to bequeath to Mrs. Sullivan her household furniture, and wines, and part of her family linen, wearing apparel, jewelry, plate, &c. &c. The testatrix in November, 1813, in contemplation of a marriage with General Henry Dearborn (which soon afterwards took effect), entered into certain marriage articles, to which he was a party, one principal object of which was to secure the disposition of her property in conformity to her said will. In these articles reference is made to the will, and it is added, "Such will to be construed according to the most obvious meaning and intent of her, said Sarah, as expressed therein, without regard to technical or formal inaccuracies therein." I will only remark in passing, that these words can have no effect to change the construction to be put by the Court upon the bequests and devises in the will, since they express no more than the law itself would imply in cases of this nature. Nor does it make any difference in the construction of this will, that it now has effect in virtue of these articles, and not *proprio vigore*. It must be still construed, in the same manner as it originally was designed to be, as a will; for otherwise, the same paper would at different times, though unaltered, require different interpretations.

Mrs. Dearborn died in May, 1826, leaving General Dearborn her survivor. After her decease, the executors proved the will and took out administration upon her estate. Some time afterwards a question arose between the plaintiffs and

the executors, whether the legacy of 20,000 dollars to Mrs. Sullivan was to carry interest from the death of the testatrix, or from a year after her death. It was finally submitted by them to the decision of the Hon. Daniel Webster, who decided that the legacy carried no interest until after the year. By the consent of all parties, and especially of the residuary legatee and devisee (who is one of the defendants in the present bill), that award is now surrendered as a defence, and the cause is agreed to be decided in the same manner, as if it had never been made. All consideration of it may, therefore, at once be laid out of the case.

There are some circumstances alluded to in the bill and answers, which are relied upon by the parties, but upon which I shall not dwell, because they do not, in my judgment, touch the merits of the present controversy. Such, for instance, is the suggestion, that Mrs. Sullivan was adopted as a daughter by Mrs. Dearborn, being in fact a grand niece. Such an adoption is denied by the answers, and is not established in point of fact; and the language of the will discloses sufficiently, that the legacy is to her as an "*affectionate niece*," and not, as a daughter, the main or exclusive object of her bounty. Again, the payment of money by the executors within the year to Mr. Sullivan, in part of the interest or income on the 20,000 dollars, is relied on. But that payment under the circumstances of this case cannot be conclusive upon the residuary legatee; and indeed is yielded up as conclusive by the subsequent receipt and agreement of Mr. Sullivan himself. Then again, the fact, that the personal estate of the testatrix yielded a full interest or income within the year, or sufficient at least to meet the interest upon the pecuniary legacy of Mrs. Sullivan, is not material; for her right does not depend upon the actual posture of the estate in this particular; but upon the general principles of law.

Neither is it material, whether the testatrix owed many debts or none; or whether the funds or assets were within the immediate reach of the executors, or time must elapse before they could be got in. In *Gibson* v. *Bott*, 7 Ves. 89, 95, Lord *Eldon* said, "In the common case of debts and legacies the same rule (as to interest) is applied to cases, where the debts cannot be arranged for ten years, and where there are no debts, and the money is immediately tangible in the funds." And in *Pearson* v. *Pearson*, 1 Sch. & Lefr. 10, Lord *Redesdale* observed, that the legacy is payable out of a fund, which is yielding profits, makes no difference. "Nothing," said he, "can be more settled than that a man's saying, 'I direct all my stock to be applied to the payment of legacies,' will not make those legacies bear interest one moment sooner than they otherwise would. Whether the fund bears interest or not, is totally immaterial in the case of pecuniary legacies." And he stated a case, where the fund did not become disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death. There are many cases to the same effect, and it would be a waste of time to go over them.[1] *Webster* v. *Hale*, 8 Ves. 410, is a strong application of the principle; for, there, interest was denied upon a legacy until after one year, although the testator directed it to be paid to the legatee "as soon as possible."

The present is not the case of an annuity, (though it has been suggested at the bar, that it may possibly so be construed,) for that supposes an annual sum payable for years or life,

[1] Gibson v. Bott, 7 Ves. 89, 92; 1 Hovenden's Supplement to Vesey, 42; Note to 1 Ves. 366; Wood v. Penoyre, 13 Ves. 325, 333; Toller on Executors, B. 3, ch. 4, p. 324; 2 Hovend. Suppl. 7, note to 7 Ves. 89; 2 Roper on Legacies, ch. 15, p. 172, *et seq.*

and not, as here, a gross sum bequeathed to the use of Mrs. Sullivan and her children for ever. The bequest is of the 20,000 dollars, and not of the mere income of that sum for a limited period. It is a final and absolute gift of the principal. I agree, that, in the case of an annuity, interest runs from the death of the testator; for otherwise the annuitant would not receive any payment for the first year, and the intention of the testator is presumed to be, that the annuitant should receive for every year.[1] Nor is this the case of a specific legacy of property or funds earning interest. If it were, I agree, that whoever is entitled to the specific property or fund is entitled to the income or increment, as an adjunct.[2]

But this is the case of a pecuniary legacy; and no time of payment, and no interest, are provided for by the terms of the will. The general rule certainly is, that, where no time of payment is provided for by the terms of the will, a pecuniary legacy is payable at the end of the year after the testator's death, and not before. Lord *Hardwicke* in *Beckford* v. *Tobin*, 1 Ves. 308, stated the rule as clear in chancery, and said, it was taken from the ecclesiastical court, which gave the executor a year to get in the estate, and pay the legacy, before he should be compelled to account. Lord *Redesdale*, in *Pearson* v. *Pearson*, 1 Sch. & Lefr. 10, attributes the same origin to it. But whatever may be the origin of the rule, it is irrevocably fixed as a general rule, and is not now

[1] Gibson v. Bott, 7 Ves. 89, 97; Eyre v. Golding, 5 Binn. R. 472; Toller on Executors, B. 3, ch. 4; Fearn v. Young, 9 Ves. 553; Houghton v. Franklin, 1 Sim. & Stu. 392; Storer v. Prestage, 3 Madd. R. 167.

[2] Barrington v. Tristram, 6 Ves. 345; 2 Roper Leg. ch. 15, p. 173; 2 Roper Leg. ch. 20, § 1, p. 188, White's Edition; Sleach v. Thorington, 2 Ves. 560, 562; Raven v. White, 1 Swanston R. 553; Webster v. Hale, 8 Ves. 410; Kirby v. Potter, 4 Ves. 748, 751.

open to controversy. It doubtless was founded in the convenience of having a fixed period, applicable to cases in general, which, if it operated injuriously upon some legatees, was beneficial to others; and it reduces to a certainty, what might otherwise be a fluctuating exercise of discretion in the executor, or the court, and involve the parties in a protracted litigation upon the nice investigation of the circumstances of each particular estate. As a corollary from this rule, it has been as constantly held, that interest is not payable upon any pecuniary legacy (unless provided for by the will) until after the year is elapsed; or, if the will fixes a period for payment, until that period is elapsed; for interest cannot be claimed except for a demand actually due, and from the time it becomes due.[1] That such is the general rule, is admitted on both sides in the argument at the bar, and indeed is established by numerous authorities.[2] It is not unimportant to notice, that it has been fully recognised by the Supreme Court of Massachusetts in *Davis* v. *Swan*, 4 Mass. R. 208.

There are exceptions, however, to the general rule. One is, when a legacy is given by a parent to an infant child, who is otherwise unprovided for; for then, upon the presumed intention of the parent to fulfil his moral obligation to maintain his child, interest will be allowed from the death of the testator as a maintenance for the child, where no other fund is applicable for such maintenance. And this is equally true, whether a future time is fixed for the payment of the legacy, or no time is fixed for it by the will. But if other funds are provided for the maintenance of the child, then interest is only

[1] Sitwell v. Bernard, 6 Ves. 520, 529.

[2] 1 Hovend. Suppl. to Vesey, 143, 144; 2 Roper Leg. ch. 15, p. 172; 2 Roper Leg. ch. 20, p. 184, (White's Edition); Heath v. Perry, 3 Atk. 101; Hearle v. Greenbank, 3 Atk. 695, 716; Lloyd v. Williams, 2 Atk. 108; Maxwell v. Wettenhall, 2 P. Will. 62.

allowable as in other cases.[1] The same doctrine, which applies to parents, is also applied to testators placing themselves *in loco parentis*; though perhaps upon the cases the distinction is sometimes very nice, if not evanescent, as to what constitutes the assumption of such a relation. *Acherley* v. *Vernon*, 1 P. Will. 783, and *Churchill* v. *Speake*, 1 Vern. R. 251, are supposed to have proceeded upon this ground; as *Beckford* v. *Tobin*, 1 Ves. 307, and *Hill* v. *Hill*, 3 Ves., and Beames, 183, most assuredly and satisfactorily did. But the exception is not allowed in favor of a legatee standing in the relation of a wife, or natural child, or grandchild, or niece, as such, any more than in favor of a stranger, unless there can be farther engrafted upon it a *parental* relation assumed by the testator.[2] Now, I have already suggested, that it is not made out upon the face of the present will, or otherwise, that Mrs. Dearborn did at the time of the will stand to Mrs. Sullivan *in loco parentis*. She was doubtless a favorite niece; but Mrs. Dearborn's bounty appears to have extended, upon the face of her will, very liberally to others standing in the same or other near relations. But, what is most material to consider is, that Mrs. Sullivan was

[1] Heath v. Perry, 3 Atk. 101; Mitchell v. Bower, 3 Ves. 287; Harvey v. Harvey, 2 P. Will. 22; Crickett v. Dolby, 3 Ves. 10; Mitchell v. Bower, 3 Ves. 283; Lowndes v. Lowndes, 15 Vern. 304; Lambert v. Parker, Cooper R. 143; Carew v. Asken, 1 Cox. 244; 2 Roper Leg. ch. 20, § 4, p. 192, (White's Edition.)

[2] Haughton v. Harrison, 2 Atk. 329; Crickett v. Dolby, 3 Ves. 10; Stent v. Robinson, 12 Ves. 461; Lowndes v. Lowndes, 15 Ves. 301; Perry v. Whitehead, 6 Ves. 544, 546; and Lupton v. Lupton, 2 Johns. Ch. R. 614, are fully in point. And whoever wishes to go more fully into this matter will find all the cases well summed up in Mr. White's late and very valuable edition of Roper on Legacies in ch. 20 of the second volume.

at this time married; and her husband is still living, and it is not pretended (and indeed, if one might travel out of the record, or consult the answers, it could not be pretended), that he was not able to maintain her. It is not asserted (and from Mr. Bowdoin's answer, I am led to presume, that the fact was otherwise), that she was not at that time of age. She certainly was much beyond that period at the time of the testatrix's death. Now, the principal ground, upon which interest is allowed to children and other persons, to whom a testator stands *in loco parentis*, is, that they are *infants*, and require a maintenance. No case can be produced, (as I believe,) where interest has been given in favor of a female married legatee, having a competent maintenance; or in favor of an adult child; for the law supposes an adult capable of maintaining himself. In *Raven* v. *Waite*, 1 Swanston R. 553, it was expressly held by Sir *Thomas Plumer*, Master of the Rolls, upon full argument, and under strong circumstances, that a female married adult legatee was not entitled to interest, until after the lapse of the year from the testator's death. His ground was, that it had never been allowed in favor of any adult legatee; and he added, "Neither reason nor authority extends the exception to adults."

But independently of this stringent decision, which has never been questioned, and is, indeed, completely sustained by *Lowndes* v. *Lowndes*, 15 Ves. 301, there is a circumstance furnished by the present will, which repels strongly any presumption, that the testatrix intended to provide for an immediate interest; and, in the absence of such presumption, would induce the Court not to decree it. I allude, not to the specific legacies of household furniture, &c., given to Mrs. Sullivan, but to the life estate given to her in the real estate in Milk Street. This is an immediate devise; and from the very terms of the will and marriage articles the estate may be pre-

sumed to be valuable; and in some of the answers it is stated to be quite valuable. How valuable I do not say; though I observe Mr. Bowdoin estimates it at the large sum of $40,000. But whatever might be its value, the Court cannot but see, that it is a fund capable in its own nature of yielding an income; and it is in this view only, that I rely on it.

But it is argued by the counsel for the plaintiffs, that assuming the general rule to be, as it is here stated, still it is inapplicable to the present case. First, it is said, that, here, there were few or no debts due from the estate of the testatrix, and therefore it was the duty of the executors to make immediate payment of the legacy; and if so, they ought to be presumed immediately to assent to the legacy, and to appropriate the funds accordingly. But it was just as much their duty to pay all other legacies as this; and just as much their duty to take care of the interest of the residuary legatee, as of the general legatees. They had a right to time to make inquiries, to arrange the funds, and to deliberate on the point, out of what portion of the personal estate the legacies could be most conveniently paid. But the rule, as to payment of legacies, does not, as we have already seen, depend upon the posture of the particular estate, whether there are debts to be paid or not, or assets to be got in or not.[1] It stands upon a broader principle of public convenience. If there are not assets in the hands of the executors at the end of the year, still interest runs from that period. If there are assets, the law does not compel the executors to pay legacies within that period. It leaves the subject, where it can best be left, to the discretion of those, who are the chosen trustees or agents of the testator to administer his estate. The law aims not so much to do exact justice in the

[1] Gibson *v.* Bott, 7 Ves. 89, 95.

particular case, as to administer a safe and steady general justice, meeting the mass of cases. In *Sitwell* v. *Bernard*, 6 Ves. 520, 539, Lord *Eldon* said, "Where an estate is given in various legacies, and the residue is given, it is a rule of convenience, that authorizes this court to say, (for there is no language in the will for it,) that those legacies shall be payable at the end of a year from the death of the testator; because, as a general rule, it may be taken, that the personal estate may be collected within a year; *though in many instances that falls enormously to the prejudice of the residuary legatee.*" The truth is, that the law does not consider the legacy for the purposes of the will as due before the end of the year; and therefore the executors are not bound to pay it before it is due; but may exercise their discretion.

Then, again, it is said, that the marriage articles provide for an *immediate* distribution of her estate according to the will. But I can read no more in the articles than a general direction, that the estate shall be distributed according to the will upon the decease of the testatrix. This can only mean in a reasonable time; and does not supersede the general rules of legal interpretation. The case of *Webster* v. *Hale*, 8 Ves. 410, where interest was denied, had a far more pressing injunction. The law cannot deal with such niceties of expression for any practical purposes, and therefore excludes them from its view.

Then, again, a constructive or positive assent to the legacy by the executors is relied on; but that goes no further than to provide a legal remedy, and not to hasten the time when the legacy is due or payable.

Then, again, a particular class of cases is relied on, as furnishing an exception to the rule, as to interest, and allowing it from the death of the testator, where the court have endeavoured to collect the intention from the language of

the will. I allude to that class of cases, under which *Sitwell* v. *Bernard*, 6 Ves. 539, *Entwistle* v. *Markland*, 6 Ves. 528, *Stuart* v. *Bruere*, 6 Ves. 529, *Fearns* v. *Young*, 9 Ves. 549, *Gibson* v. *Bott*, 7 Ves. 89, *Hutchin* v. *Mannington*, 1 Ves. Jun. 366, and *Angerstein* v. *Martin*, 1 Turner R. 232, fall. But that class chiefly respects cases, where a residue is given to one for life with remainder over. There are no circumstances in the present case, which bring it within the reach of the principles of those decisions, and it is therefore unnecessary to discuss them.

Upon the whole, in every view, in which I can consider this case, after the very learned and able arguments, with which I have been furnished, and which have so much aided me in arriving at a satisfactory conclusion, my judgment is, that upon this legacy Mrs. Sullivan was not entitled to any interest until a year after the death of the testatrix. The general rule established for a great length of time is against the allowance. The present case is not within any known exception to that rule. I am not bold enough to make a new one; and must content myself on this, as on many other occasions, not in doing what I might wish in the particular case, but what the law requires from one, whose duty it is merely to expound it.

But there is one circumstance in the case, which materially affects the application of the rule in the present case. It appears, that the executors did in point of fact within the year invest six thousand dollars in their own names as trustees of Mrs. Sullivan, and also, upon her written request and upon security given by her husband, did loan to him the farther sum of three thousand dollars, making in the whole an investment in fact upon her account of $ 9000. Now it appears to me, that this was equivalent to the payment of so much of her legacy. It was an appropriation of so much to

her exclusive account, and discharged the estate of the burthen *pro tanto*. In the case of such a payment within the year directly to a legatee, there can be no doubt, that the subsequent income of the sum so paid must belong to the legatee. It appears to me, that the appropriation of the sum in the hands of the trustees of Mrs. Sullivan for her use, and on her account exclusively, is not distinguishable in principle from the case of payment.

It has been already stated, that Mrs. Sullivan could not claim interest until after the year; and the executors could not be compelled to pay the legacy until that period. But it by no means follows, that, as a matter of discretion, the executors were not at liberty to pay the legacy within the year. There would be no breach of duty in so doing. They might, if they had seen fit, have invested the whole $ 20,000 for Mrs. Sullivan exclusively in stock within the year; and if they had, she would from the time of the investment have been entitled to the income. In *Pearson* v. *Pearson*, 1 Sch. & Lefr. 10, 12, Lord *Redesdale* said, "*The executor may pay the legacy within the twelve months*; but he is not compelled so to do. He is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets, he is to pay from the end of the twelve months, whether the assets have been productive or not." And in the recent case of *Angerstein* v. *Martin*, 1 Turner R. 232, 241, Lord *Eldon* said, "I know of no case, which prevents executors, if they choose, from paying legacies or handing over the residue within the year; and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing." The same doctrine is found in elementary writers. See 2 Roper Leg. ch. 20, § 2, p. 188, (White's edition.) But it is sufficient for my guidance, that it

is founded in reason, and has the authority of such extraordinary Judges, as Lords *Eldon* and *Redesdale*, to support it.

My opinion, therefore, is, that whatever interest or income accrued within the year upon the nine thousand dollars invested or lent on account of Mrs. Sullivan, she is entitled to, and it does not fall within the residuum.

The decree will be framed upon these principles; and it will then be referred to a master to settle the amount due in conformity thereto. Under all the circumstances, I shall apportion the costs equally between the plaintiffs and the defendants, and that portion, which falls on the executors, is to be paid out of the estate.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1830, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

UNITED STATES *v.* RICHARD D. HARRIS.

Where the Legislature by a special act authorizes a street or highway to be laid out, and bars any action for possession or damages after the laying out, and provides for the damages in a special manner, the owner is still entitled to the fee, subject to the easement.

Such special acts are to be construed in conformity to the general highway acts, unless the Legislature use words, which show, that the fee of the lands taken is intended to pass from the owner.

The laying out of a highway at the common law and under the highway acts of Massachusetts does not deprive the owner of the fee, but only subjects it to the easement.

THIS was an action of trespass brought by the United States to determine the title to a piece of land situated within the limits of the Navy Yard at Charlestown in Massachusetts. The principal facts, as agreed upon by the parties, were as follows.

In October, 1781, the Legislature of Massachusetts passed an act, entitled an act for widening and amending the streets,

lanes, and squares, in that part of the town of Charlestown, which was lately laid waste by fire. The act, after reciting, that a committee was appointed by the town for regulating the streets, lanes, and squares in that part of the town, which was so laid waste, and that the committee had accordingly proceeded to lay out the same, a plan of which had been laid before the court and was then deposited in the secretary's office, proceeded to enact "that the proceedings of the committee be and they are hereby confirmed; and all actions, that shall be brought for *recovering possession* of any land lying within any of the streets, lanes, squares, &c., laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and forever barred." It further enacted, that no buildings whatsoever be so erected as to encroach upon any street, lane, or square, by them so laid out as aforesaid; and reciting, that some persons may suffer damage by laying out the streets, &c. according to the plan aforesaid, and others may receive benefit and advantage thereby, provided, that the value of all lands and buildings and other materials, taken from any person by virtue of the act, should be ascertained by appraisers chosen in the manner pointed out by the act, and that the town should be held and obliged to pay to the person interested in the land, buildings, and materials aforesaid, the sum at which it may be appraised. In like manner persons benefited by the proceedings were to be assessed a proportionate sum, which their estates were subjected to pay.

It does not appear who, at this time, were the owners of the land now in controversy before this Court, upon the special case agreed by the parties. But John Harris, the ancestor of the defendant, became owner thereof by deeds executed to him of various portions in 1791, 1792, and 1793, by various grantors. Although the plan of the committee was

thus confirmed, no street was ever in fact laid out and opened over the premises until 1795 or 1796, when the town of Charlestown laid out a street over a part thereof, called Battery or Water Street, for which a full compensation was paid to Harris by the town, by an award under the act of 1781. And again in 1798 or 1799, another street was laid out by the town, over another part thereof, called Henley or Meeting-House Street, for which the town also paid a full compensation to Harris. Both streets were however marked out in the plan, and were finally laid out and opened, in conformity thereto. In this posture of affairs, the Legislature of Massachusetts in June, 1800, passed an act * consenting to the purchase by the United States of a tract of land in Charlestown for a Navy Yard, and ceding jurisdiction of the tract, not exceeding sixty-five acres.

By that act, the value of the land so taken, when not agreed by the parties, was to be ascertained by a jury in the manner prescribed by the act. And accordingly the value of the land of Harris included in the Navy Yard was, upon the petition of Aaron Putnam, Agent of the United States, so ascertained, and the amount paid to Harris by the United States in November, 1800, and February, 1804.

In the proceedings under this inquest, five different parcels of land of Harris were set forth by abuttals as taken by the United States, and separately valued. One of these (No. 1) was on the north side of Henley or Meeting-House Street, abutting thereon; another (No. 2) on the south side of the same Street, and abutting thereon, and also on Battery or Water Street; the other three (Nos. 3, 4, and 5) were on the south side of Battery or Water Street and abutting thereon. Nothing material occurs in the description of either lot, ex-

* Act of 17th June, 1800—2 Mass. Laws (1807), p. 940.

cept that in No. 2 the description begins as follows; "One other lot of land *with the appurtenances*, containing one half of an acre, &c." There were at that time three wooden buildings on No. 2, and no buildings on either of the other lots.

In January, 1801, the town of Charlestown, for the accommodation of the Navy Yard, by vote declared, that such parts of the following streets and passages belonging to the town, as are included in the limits of the Navy and Dock Yard be granted for the sole use of the United States; and that their termination from the Main Street be as follows, &c., describing certain lines across Henley or Meeting-House Street, and across Battery or Water Street. Harris being present at this town meeting protested against the grant "on account of his rights to the advantages of the said streets."

The premises in controversy constitute the land of the said street so discontinued, and granted to the United States.

The defendant claims the premises under Harris by devise and heirship.

Upon these facts (which are the most material to be stated) the question arose, whether the United States had acquired any title to the premises in controversy, which are now included within the sixty-five acres and visible bounds of the Navy Yard.

Dunlap (District Attorney) for the United States.

It is contended that Putnam's petition shows what land was wanted, and taken for the use of the United States, that is John Harris's "lots," over which the roads had been laid out, which covered the places demanded on the part of the heirs of John Harris. This petition is broad enough to embrace the freehold of the roads, as was manifestly intended, being parts of those "lots." The jury were merely to *value*, not to *bound* the tract taken by the United States. Massachusetts Act of June 17, 1800, § 2.

Where it is not known to whom the fee of the road belongs, it is *presumed* to belong to the owners of the adjoining lots *ex utraque parte*, obviously upon the ground, that the road was taken out of what was once one lot, and belonging to the present or former owners of the adjoining tracts. In this case, the road, or the fee in the road, would have belonged to John Harris, as an abutter on both sides; for it would have been *presumed* to have been his property. The United States, taking his parcels bounded on the road, would have succeeded to his rights upon the *presumption*, that the fee of the road belonged to him. Can they lose their rights to the fee of the road, when, instead of being *presumed*, it is *proved* to have belonged to him, when the United States took the adjoining parcels *ex utraque parte*? Com. Dig., *Chimin*; 1 Rol. Abr. 392, *pl.* 13; 1 Brownlow, 42; Lofft, 359; 13 Mass. R. 259; 3 Kent's Com. 349; 1 Conn. R. 103; Justinian's Inst. Lib. 2, Tit. 1, § 25.

Under the term "appurtenances" in the valuation of one of the parcels bounded on both the roads, the fee of which is in controversy, the reversion of these roads passed. This was a summary proceeding, and not to be viewed with the strictness with which courts, from the force of precedents, established in the days of astute legal refinement, are accustomed to construe common law conveyances, oftentimes following precedents, which in these times would not be established. The appurtenances do not mean the buildings, for buildings pass with the land; *Cujus est solum, ejus est usque ad cœlum.* When buildings are referred to by those, who doubt, whether they pass with the land, or *ex majori cautelâ*, they are always distinctly mentioned. By appurtenances is meant, not what is *on*, but that which is *off* the land, the *adjunctum* of the civil law; and we say appurtenant *to*, but

never appurtenant *on*. The difficulty about land not being appurtenant to land is not insuperable, and in this case presses with less force, because it is a sort of *reversion*, after the discontinuance of the road, which passes, and which, according to the doctrine in Shepherd's Touchstone, 89, may well pass as appurtenant to a possession. No one can suppose, that it was the intention of the parties to leave these slips of land in the Navy Yard, to be, thirty years after, the subject of contention and annoyance; and if the proceedings have been such as to produce this state of things, it is manifestly from a blunder, and not from design. The claim therefore rests on technicalities; and, it is believed, there is more of technicality to rebut than support it. The following authorities were quoted and commented upon. Coke Litt. 121, 122; Hargrave and Butler's Note, 174; Coke Litt. 5 *b*, 56 *a*, *b*; Cro. Jac. 121, 526; Cro. Car. 17; Cro. El. 16, 113, 114, 704, 89; Plowden, 170 *B*; 1 Levinz, 131; Shepherd's Touchstone, 90; 2 T. R. 491, 502; 1 Bos. & Pull. 53; 2 Wm. Black. 727; 2 Saunders, 400; 3 Mason, 279, 280; 17 Mass. R. 447, 448; 8 Johnson's R. 49; 6 Mass. R. 332.

John Harris's protest against the vote of the town of Charlestown passing the streets to the United States, was merely as an inhabitant of the town, to preserve the road, on account of his interest "*in the road*"; and it shows clearly that he considered his fee of the road taken; else he would not have protested against an act, the legal effect of which is, upon the ground now taken by his heirs, to revest in him the whole road and fee.

The fact respecting the land purchased subsequently of Commodore Hull, it is contended, has no bearing upon the construction of Putnam's petition, and the verdict of the jury.

The jury found one lot of John Harris's in two *parcels*, each bounded on Henley or Meeting-House Street, and they made a valuation of the whole lot by *parcels* from some imagined convenience. Still it is as much one lot, as a field through which a foot or cart way is granted, and as one lot completely covered by Putnam's petition.

If, by the Statute, the United States were authorized to take what might be wanted for the Navy Yard, not exceeding sixty-five acres, lying between Mystic and Charles Rivers, against the will of the owners, which is believed to be the true construction of the Statute, then all described in Putnam's petition, that is, John Harris's "lots," which include the roads, pass as levied upon by the United States. On the other hand, if the United States were not authorized to take the property against the will of the owners, then John Harris's receipt of the purchase money must be considered as an assent to the conveyance, and Putnam's petition is in the nature of a grant from Harris. In either case the result will be the same, and the roads be found included in John Harris's "lots," whether taken from him with or without his consent.

These streets, the fee of which, upon their being discontinued, is now claimed by the heirs of John Harris, were laid out by a committee of the town of Charlestown after the burning of that town by the British on the 17th of June, 1775, according to the plan in the office of the Secretary of the State of Massachusetts. By the Massachusetts Statute of October 30th, 1781, the proceedings of the committee were confirmed; and by the first section it is provided, that "all actions that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c. laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and for ever barred." The

language of this Statute is as strong as possible; "*all* actions for the possession of *any land* lying within any of the streets, &c., are to be utterly and for ever barred." This Statute, it is contended, destroys, in relation to the lands covered by these streets, the common law principle, that the ownership of the fee reverts to the original owners of the soil upon the discontinuance of the road; and the common law always gives way to the Statute. 1 Blackstone's Comm. 89. In large cities and towns, the public necessity or convenience may require, that something more should be taken for streets, than the mere easements of a right of passing, which will answer for common highways. The freehold or fee may be required, and therefore may be taken. By this Statute also all claims were "utterly and for ever barred," not only for the land lying within the *streets*, but also that lying within the "*squares*" laid out by the Charlestown committee. For the "squares" the freehold would be wanted, and the words of the Statute as well bar all claims for the land lying within the "streets," as those within the "squares."

Minot for the defendants, argued

First. That the soil and freehold of the street called Henley or Meeting-House Street, and of the street called Battery or Water Street, did not pass to the United States, under and by virtue of the term *appurtenances* used by the jury in their verdict in the description of the Lot No. 2, or by the description in said verdict of lots No. 1 and No. 3, or by the proceedings, by which the land was taken by the United States.

By the second section of the Massachusetts Statute, of June 17th, 1800, authorizing the purchase of the Navy Yard, it is provided, that if the agent of the United States and the owner of the land cannot agree in the sale and purchase,

the land may be taken by the United States and valued by a jury.

John Harris did not agree to the sale, and the land was taken under the Statute by the agent of the United States. The transfer was therefore *in invitum*, and Harris cannot be considered as having made a voluntary conveyance of it. Before Meeting-House and Water Streets were laid out, said Harris owned all the land from the lane leading to the Brick Yards to low-water mark. In 1800 these streets had been laid out, and the jury valued the land in distinct parcels.

The verdict finds, that the jury were shown *several* lots of land, and that they had set out these lots by metes and bounds. If the United States meant to take the whole land of said Harris, including what was covered by streets, it is not easy to conjecture, why the jury should have valued it in separate lots; no advantage could result to either party from this valuation. The Statute does not require, that the land should be set out by metes and bounds; and all that could have been necessary was to describe the land with reasonable certainty, so that it should appear, that it was within the limits allowed for the purchase.

But, in fact, the jury did not take the whole of Mr. Harris's land; they left a small gore adjoining the lot No. 2, which his administrators sold to Commodore Hull, and which he sold to the United States; and that gore is now within the precincts of the Navy Yard.

It is inferred, that the jury did not intend to include, and did not in fact include, the soil and freehold of the streets as parts of the land taken and valued by them, from the following facts and reasons.

(1.) The jury describe the several lots, as they were enclosed by fences running completely round them, and, where they were bounded by streets, describing them as

running *on* or *by the streets*, and thereby excluding the streets. In fact, a map of the lots could not afford a more perfect or definite description, than the jury give.

The only doubt, which has been suggested, whether the streets are excluded, arises from the use of the word *appurtenances* in the description of the second lot. It was argued in the Court below, that if the term "appurtenances" carried the two streets on which the second lot was bounded, it would give all the streets of which said Harris owned the soil; but this is an error in fact.

Water or Battery Street extends from the east end of lot No. 2, to a point marked B, on the south-east corner of lot No. 1, a distance of more than 300 feet; and, for that distance, it cannot be pretended, that the soil of the street can be affected by any construction of the term "appurtenances," as used in the description of lot No. 2.

(2.) It appears from the statement of facts, that there were buildings on lot No. 2, and no buildings on the other lots. This was probably the reason, why the jury distinguished this lot from the others. The term "appurtenances" is often used in common parlance, to mean *buildings*. There was something on this lot, which gave it an additional value above the others. Persons unskilled in conveyancing are apt to consider some notice of buildings as proper in a deed of land. It is apparent, that there is no technical nicety in any part of the proceedings. The United States agent, Mr. Putnam, was not a lawyer; and it would appear from his petition, as well as from other parts of the proceedings, that he did not employ counsel.

(3.) If the jury intended to include the streets, under the term "appurtenances," in the second lot, why did they not use the same term in describing the other lots? Lot No. 1 is wholly surrounded by streets; and it is reasonable to suppose,

that if they intended to give the streets, they would have done it most especially in describing No. 1. These streets were as important to the Navy Yard as those adjoining the other lots.

(4.) There is no award of the value of the streets in the verdict. As said Harris did not make a voluntary sale, the jury were bound to value all they took from him.

(5.) On the north side of lot No. 1 is the road leading to the Brick Yards (which is one of the roads discontinued by the town.) This road, or a part of it, was sold by the town to Aaron Putnam, by deed, dated March 25th, 1801, in consideration of said Putnam's agreeing to make a new road, north of the old road.

The road thus conveyed by the town to said Putnam, he conveyed (with other land) to the United States, on the 2d of April, 1801. From these transactions, it is inferred, that Putnam, the agent of the United States, did not consider the soil of the streets as taken by the jury.

(6.) When the United States took the land from said Harris, the streets were public highways, and the soil was of little value to said Harris *to sell*, incumbered as it was with the easement; nor could he make any valuable use of it, until the easement was discontinued.

(7.) The protest of said Harris, made in public town meeting, is evidence, that he did not believe the soil of the streets had been set off by the jury, and that he considered himself as possessing an interest of some value in the streets.

Jackson v. *Hathaway*, 15 John. R. 447. Where a person, over whose land a highway is laid, sells the land on each side of the highway, by such a description as does not include the road or any part of it, the soil of the highway does not pass to the grantee; as it is excluded by the description of the land granted, and cannot pass as an incident,

though the deed contain the usual sweeping clause of all right, title, interest, &c.

In *Tyler* v. *Hammond*, 11 Pick. 193, the defendant held a lot of land, granted with an exact description of all the boundary lines. The deed contained a sweeping clause, under which the defendant claimed the soil in the adjoining highway; but the court held, that the particular description controlled the sweeping clause in the deed, and that the highway did not pass as an incident or appurtenant.

Secondly. That the limitation contained in said Statute of October 30th, 1781, was not a bar to the defendant's right to the soil and freehold of said streets.

From the whole of the Statute, it is obvious, that the Legislature intended to conform the acts of the committee, as nearly as their doings would permit, to regular proceedings under the existing Statutes relating to highways, and also to provide an equitable contribution from estates not taken for highways, on account of the advantage derived to such estates by laying out streets in their vicinity.

It appears from the preamble, that the town of Charlestown was desolated and destroyed by the events of the war. An effort was made in 1780 to recover it, to restore order and regularity to the streets, and to enable its inhabitants to rebuild their houses on a uniform plan.

The preamble states, that a committee was appointed by the town "for regulating the streets, lanes, and squares, in that part of the town, which was so laid waste, and the committee has accordingly proceeded to lay out the same."

The committee, being appointed by the *town*, had no power under the existing laws to lay out streets; that power being vested in the Selectmen personally, or "such persons as they shall appoint," and subject to the ratification of the inhabitants in town-meeting. But the committee of the town

had no power to regulate the streets. Their object was to ascertain the lines of the streets (in that part of the town, which had been laid waste,) which were obliterated by the destruction of buildings, &c. In doing this, the committee were liable to error by including within the lines of streets, lands not before included.

The business of the committee was to regulate (which in this connexion must mean to restore to order and the former condition) the streets, and the "committee accordingly proceeded to lay out the same." Here is no suggestion that any act had been done, affecting the right to the soil, but only that the streets had been regulated, and laid out; proceedings, which do not necessarily or usually touch the freehold.

It is presumed that the town discovered that the committee had transcended their powers, and it became necessary to apply to the Legislature to confirm their doings. What the proceedings of the committee were, appears from the preamble. They had regulated and laid out highways. If their proceedings had been regular, no confirmation was necessary.

Wherein were they irregular? The committee was irregular in its creation. A committee so appointed having no power by law to lay out highways, all its acts were void. It is gratuitous to suppose that the irregularity was in taking the soil for highways, since we prove an actual irregularity, which could be cured by the power of the Legislature only.

It was no advantage to the town to have the fee of the highways, nor is it to be presumed that the Legislature would give to Charlestown more than it gave to any other town in the Commonwealth.

The first section of the act confirms the proceedings of the committee, and bars actions for possession or damages.

This section places the owner of the land in the same situation, as he stood by the existing highway statutes, except that he cannot question the regularity of the taking by the committee, as he might an irregular taking under the highway statutes. When land is regularly taken for a highway, *no action for possession or for damages* can be maintained by the owner. His only remedy is by petition, &c. Stat. of Mass. 1786, ch. 67.

This statute was intended to make the proceedings of this committee equivalent to highway statute proceedings, and nothing more.

The preamble to the fourth section, says, that, "whereas some persons may suffer damage by laying out the streets," &c. This is the language used in the highway statutes. "Damage by laying out," &c. is surely not descriptive of the loss of the freehold. It is used to express the value of the easement taken by the public.

The common law, which preserves the freehold of a road to the owner of the land, was early adopted in Massachusetts; and it is not easy to conjecture any reasons why the Legislature should alter the law in this particular instance, (and there is no similar instance since the settlement of the country,) or why the town of Charlestown should desire to possess the freehold of the roads, when the easement was just as valuable to them. The town was at that time so poor as to command the charity of the General Court; and can it be believed, that it would prefer to take the fee of the highways, and thereby incur a greater expense than if the easement only was taken?

The public exigencies require that highways should be established, and they are provided to be laid out and a reasonable compensation is provided by a series of statutes enacted very early after the settlement of the country, altered and

continued to the present time. But it is only a public exigency which justifies the appropriation of the property of an individual to public uses. No such exigency existed in the case at bar. The appropriation of the freehold of a road to the public was wholly unnecessary and totally worthless. It is true that the statute provides a compensation in this case; but from the language used, "damages for taking," being the same as used in highway statutes, it may be inferred, that the Legislature intended damages for the easement only. It cannot be presumed, that the Legislature intended unnecessarily to violate private property, or to depart from the usual course of legislation on similar subjects; and in the absence of any manifest intention in the statute itself, to take the freehold of the streets, as well as from the uselessness to the town of such a proceeding, it is manifest that the Legislature have adhered to the usual course of legislation on the subject of highways, and have given to the town all that it was needful for it to possess, without unnecessarily violating the property of an individual.

It may be said, that John Harris has given validity to an illegal act by accepting a compensation.

The reply is, that he had a right to compensation for the easement; that what he received was accepted by him for the value of the easement; and this is apparent from his protest at the surrender of the streets to the Navy Yard, "on account of his right to the advantages of the streets."

But it is doubted whether the laying out of Water or Battery Street and Meeting-House Street is affected by the operation of this statute.

The language of the statute is retrospective. It confirms the past proceedings of the committee. It speaks of lands taken away by the plan. The streets in question were laid out up to the present line of the Navy Yard in 1781, but

were not carried into the land now occupied by the Navy Yard until 1796 and 1799, and the land now claimed by the heirs of John Harris was not taken from him till 1796 and 1799. The streets were not laid through the Navy Yard in 1781. There was no taking of Harris's land at that time, and there could be no damages before taking. The referees in 1796 speak of a street proposed to lead to the Meeting-House, "but not yet opened."

Can the statute of 1781, confirming past proceedings, bar an action for an act done in 1796? Harris had sustained no damage in 1781. Nothing was taken from him, he had the vesture and herbage and all other profits of the land till 1796.

It will be seen, by reference to the statement of facts, that the town of Charlestown sold Back Lane, one of the streets in the Navy Yard not laid out by the town's committee in 1781, and upon which that act could have no operation. From this fact it appears, that the town considered itself vested with the whole property in the streets by the mere act of laying them out, and did not consider that property as derived from the act of 1781.

Thirdly. That, upon the discontinuance of a highway by the public, in Massachusetts, the soil and freehold of such highway reverts to the owner of the land taken for such highway.

It is the settled law of Massachusetts, that, by the location of a way over the land of any person, the public acquire an easement; but the soil and freehold remain in the owner although incumbered with a way, and if the way be discontinued he shall hold the land free from the incumbrance. This position is fully sustained by the decisions of the Supreme Court of Massachusetts, in *Commonwealth* v. *Peters*, 2 Mass. R. 127; *Fairfield* v. *Williams et al.* 4, 427; *Perley* v. *Chan-*

dler, 6, 454; *Alden* v. *Murdock*, 13, 259; *Stackpole* v. *Henley*, 16, 33; *Robbins* v. *Bowman et al.* 18, 122.

STORY J. The general principle of the common law is, that the soil, over which a street or highway is laid out, still remains the property of the original owner, subject to the easement, and he may pass the title thereto, notwithstanding the incumbrance.

This principle is not now contested; and the only question is, how far it applies to the actual circumstances of the present case.

First, it is said, that the land on both streets (No. 2 abutting on opposite sides on them) will pass under the inquest as "appurtenances" of No. 2. It may be admitted, that land may pass as "appurtenances" to other land, if such be the clear intent of the parties, as gathered from the terms of the deed or other instrument of conveyance; for, in such a case, the law does not insist upon strict propriety in the use of language, but is content to expound the words of the parties, and give effect to the instrument, according to the real and unquestionable meaning of the parties. But, strictly speaking, in a legal sense, land can never be appurtenant to land. But a thing, to be appurtenant to another, must be of a different and congruous nature, such as an easement or servitude, or some collateral incident belonging to and for the benefit of the land. In Co. Lit. 121, b., it is said, that nothing can be appurtenant, unless the thing agree in quality and nature to the thing whereunto it is appurtenant; as a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. And there are many other authorities to the same effect in Com. Dig. *Appendant* and *Appurtenant*, and *Grant* E. 9.

In a case, therefore, where the words of a grant pass land "with its appurtenances," the law will, in the absence of any

controlling words, deem the word *appurtenances* to be used in its technical sense; and that construction will not be displaced, until it is made manifest from other parts of the grant, that some other thing was actually intended by the parties. I say, until it is made manifest; by which I mean, clearly and definitely ascertained, that the word is used in another sense. I add also, from other parts of the same grant; for it is not open to parol evidence to explain or vary the legal sense. If there is nothing *in rerum naturâ*, upon which the word can operate, that does not entitle the court to desert the legal sense. It has been said by the counsel for the defendant, that there were buildings on No. 2, to which the word "appurtenances" is commonly applied. But such buildings are in no just sense "appurtenances"; but if annexed to the freehold, they are a parcel of the land, and pass as such by the deed. It is not, however, necessary to show, that there are things granted, to which the word applies. It is often thrown in by conveyancers without any actual knowledge of the premises, to avail, as far as it may avail, by way of cautionary enlargement of the principal grant, if there be any thing, on which it may operate. If there be in fact no appurtenances, then the word, like other expletives in a deed, is merely nugatory. The authorities cited at the bar upon this point are full to the purpose, and especially *Leonard* v. *White*, 7 Mass. R. 6; *Jackson* v. *Hathaway*, 15 John. R. 447; and the very late case of *Tyler* v. *Hammond*, 11 Pick. 193, in the Supreme Court of Massachusetts.[1]

Now, in the present inquest (sufficiently loose in all its proceedings, and inartificially conducted, considering the magnitude of the interests at stake), there is nothing, upon

[1] See also Com. Dig. *Chim.*; 2 Saund. 400 and note; 6 Mass. R. 332. To which I would add *Whitney* v. *Olney*, 3 Mason, R. 280.

which the Court can put its finger, that in any manner justifies it in supposing the jury intended by "appurtenances" any thing but what are such in the legal sense. They appraise "one other lot, No. 2, with the appurtenances," then describing it by metes and bounds. These metes and bounds do not include the streets, or either of them. The lot is bounded by the streets, not over them. All the other lots are bounded on one of these streets; and there is no mention of "appurtenances" in the description of either of them. Yet if the intention were to include the land belonging to the streets, it must have been equally direct in regard to all these lots, as in regard to No. 2. The truth is, that no particular stress was laid on the word "appurtenances." If the streets had been private ways, the right to use them would have been "appurtenances" in the strict sense. But, as highways, they were public easements. This distinction may not have been attended to by the parties; and therefore the word "*appurtenances*" may have been inserted from greater caution. But the omission of it, in regard to the other lots, rather leads to the conclusion, that it was a chance hit, without intention or object. At all events, the fact, that all the lots are bounded by abuttals, which exclude the streets, irresistibly shows, that the jury did not intend to include them. If they had so intended, some positive expression would have been found.

It has been said, that the duty of the jury was, to value the land only, and not to describe its boundaries. If it were so, it is too late to correct the error. But I am of opinion, that it was their duty to describe the land taken by definite bounds, in order to show the extent of this acquisition of property by the United States, in a proceeding *in invitum*. The description should be as definite and clear, as in a common grant. The title of the United States might otherwise

have been brought into jeopardy. How, indeed, could the jury value the land without ascertaining its extent? So far then, as the title of the United States is sought to be maintained upon this inquest, it appears to me unsustainable.

A question of more difficulty arises upon the construction of the act of 1781; whether it was simply intended to authorize the creation of servitudes or easements in the lands, over which the committee had laid out streets, lanes, and squares, according to the plan confirmed by the Legislature; or whether it was intended to vest in the town the title and freehold of the soil itself, over which these streets, lanes, and squares were so laid. In other words, whether the town was to acquire the whole property in the land taken for streets, lanes, and squares, paying damages to the full value; or was to acquire only a right of way, or public use, paying damages only for such right, and leaving the general ownership in the land, as it was before. It is unnecessary to consider, how far the Legislature possessed a constitutional authority to take the lands for either purpose, depriving the owner of the right of a trial by jury to ascertain his damages; for Harris took no such exception, and received a compensation awarded according to the provisions of the act. But it is material to state, that by the terms of the act it is declared, that "*all actions*, that shall be brought *for recovering possession* of any land lying within any of the streets, lanes, squares, &c. laid out as aforesaid, or for damages sustained or occasioned thereby, *shall be utterly and for ever barred.*" In the ordinary mode provided by law for laying out town ways, streets, and highways under our general statutes, it is clear, that an easement only is created; and, subject to that, the general propriety remains in the owner of the soil at the time of laying it out. He may use it for any purposes, not inconsistent with the easement. He is entitled to any profits from the

herbage on the way-side, and may maintain trespass for any wrong or dispossession by any intruder. The present act in terms bars *for ever* actions brought for possession of any such lands; and therefore, taken in its literal signification, it may seem intended to bar for ever all possessory rights and remedies.

It is true, that it does not purport to transfer any right. But the question made is, whether it does not so by fair implication. Could the owner, after the act, enter into possession, and thus destroy the easement? Could he enter into possession and cultivate the soil, not obstructing the easement? The pressure of the cause appears to me mainly to rest on this point; for, if all the right of Harris, and of those under whom he claimed, to the soil, was intended to be extinguished or to be vested in the town, then the defendant is guilty of a trespass. If not, then the title belonged to Harris; and the grant of the town, except so far as it operated as an extinguishment or discontinuance of the street over the premises, was utterly void. It is plain, how the town understood the act. They acted upon it as transferring the title in the land to them; and they accordingly, by their vote in 1801, intended to grant it to the United States, so long as the Navy Yard should be continued in that place. This mistake, however, on the part of the town, if it be a mistake, cannot change the legal right of the parties; but the case must be decided wholly upon the terms and intent of the act of 1781.

After reflecting a good deal upon the subject, my mind has at last come to the conclusion, that the act of 1781 was not intended to pass the freehold in the lands, but to create only an easement, which might be, and probably then was, contemplated to be perpetual. I will shortly state the reasons, which have conducted me to this result. In the first place,

every act of a special nature, in derogation of private rights, ought to be construed strictly. This principle of construction is founded in the common law. And in cases of this nature, it acquires additional force from the constitutional provision in the Bill of Rights of the Constitution of Massachusetts, that, "whenever the public exigencies require, that the property of any individual shall be appropriated for public uses, he shall receive a reasonable compensation therefor." The right, therefore, to take private property for public uses is limited to cases of public exigency. If the Legislature expressly, or by necessary implication, state the exigency to exist, and the extent to which the property is to be taken, that would in common cases be decisive. But if the words used be equivocal, and upon the act it stand indifferent, whether a right of way only, or a right of freehold be taken, the natural construction would be, that the Legislature intended an easement only, as that would be co-extensive with the exigency of the public use.

Now, it is perfectly obvious, from the preamble of the act of 1781, that the committee of the town were appointed to *regulate* the streets, lanes, and squares in that part of Charlestown, which was laid waste; and that they had "proceeded to lay out *the same*," that is, to lay out the streets, lanes, and squares. This power, thus given by the town, was an excess of municipal authority, and not within the purview of any of the general statutes for the opening or widening of streets and highways. It was, therefore, *ipso facto* void, unless it received the confirmation of the Legislature by some new enactment. The act of 1781 gave such confirmation. But the confirmation was intended to go no farther than the original authority, given by the town, extended; or at least no farther than the acts of the committee under it had gone. There is not a word in the statute, which looks beyond the

acts of the town and committee; or which purports to provide for more extensive operations. The power given by the town to the committee was, to *regulate* the streets, lanes, and squares, in the part of the town laid waste. It is not easy to give any very exact sense to the term "*regulate*" in this connexion. It ordinarily implies, not so much the establishment of a new thing, as the arrangement in proper order of such as already exist. It might have meant no more than to ascertain, and fix, the lines and limits of the existing streets, lanes, and squares. But a liberal interpretation might perhaps fairly include the power to widen, alter, and extend the streets, lanes, and squares in that part of the town, so as to provide for the public convenience, and the mutual connexion of the whole. The committee appear to have acted upon this interpretation; and after such a lapse of time it would be too much to hold it unsound, or unjustifiable, especially when it has received a legislative sanction.

Assuming then, that the power to regulate, included the power to lay out streets, does the latter naturally or necessarily include the power to take away the freehold from the owner of the soil, or only to create an easement over it? In the construction of the ordinary statutes respecting highways, the power given to selectmen, and other public functionaries, "*to lay out*" streets and highways, has always been held, (as has been already stated,) not to take away the freehold, but to create an easement only. The extraordinary power given to the committee is only a substitution of them for the ordinary functionaries. The power is the same; but the persons, who are to exercise it, are different. In what manner does this change the nature or extent of the power itself?

It is a great misfortune in this case, that we cannot find the original doings of the committee in the town records; nor the petition of the town, on which the act of 1781 was

founded; nor indeed any other proceedings relative thereto. We are compelled to rely wholly on the preamble of the statute for every memorial of the acts of the town and the committee. Under such circumstances, it seems to me, that we are bound to construe the statute *cypres*, and to subject its terms to the same interpretation, as words of a similar import have in the ordinary highway laws. The Legislature ought to be presumed to use the words in the common sense, and under the same limitations, which the common law implies, unless some other intention is clearly manifested.

The prohibition to maintain any action for possession, or for damages, does not necessarily import such an intention. It is true, that in common cases of highways the owner of the soil may maintain an action for possession, subject to the easement. The words of the act of 1781 seem to bar such an action. But their generality may well be limited to cases, where a possession is sought inconsistent with the easement. The same clause bars any action for damages. What damages? Clearly for *laying out* the streets, not for taking the fee of the lands. The 4th section of the act provides for the manner of ascertaining the damages; and, though it speaks of appraising the value of the lands and buildings taken under the act, yet the preamble to that section expressly shows, that it is the damages done "by laying out the streets," and not by transferring the fee to the town. For all the purposes of the act the public use is just as complete and perfect by the establishment of the streets, as by a transfer of the fee. The latter was not necessary for any avowed purpose of the town, or of the committee, or of the Legislature.

It has been urged, that the act of 1781 did not extend to the land in controversy; for Water or Battery Street and Meeting-House Street were not laid out over the premises

until many years after the passage of it. If the plan and report of the committee did not in fact contain a laying out of these streets in a legal sense, (for the time of their being actually opened is quite a different consideration,) it is perfectly clear, that the act of 1781 does not apply to them; for it confirms past proceedings only in laying out, and does not purport to authorize future proceedings of a like nature. And here, again, we are in the dark; for the proceedings of the town, as to these streets in 1795 or 1796, and in 1798 and 1799, cannot be found; and we have no means of ascertaining their import or effect. The plan alone remains; and that certainly extends the lines of the streets, as they were subsequently opened. In my view of the case, the adoption of the plan by the Legislature in 1781 must be deemed, in a legal sense, a laying out of streets at that time; and the subsequent proceedings of the town were not a new laying out, but merely an opening of the old streets in conformity to the plan. Upon this point the argument is not, therefore, sustained.

But, for the other reasons already stated, my judgment is, that the laying out of the streets over the premises in 1781 did not transfer the fee from the then owners of the land, but left it in them, subject to the easement. And, according to the agreement of the parties, the United States are to become nonsuit.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1830, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

W. AND D. D. FARNUM
v.
THE BLACKSTONE CANAL CORPORATION.

The Blackstone Canal Company were authorized by their act of incorporation to construct a canal, &c.; and the manner pointed out in which they should locate the canal, &c. *Held*, that in order to entitle the company to raise a dam by which the water of the river should flow back to the injury of the riparian proprietors, the location of such dam and the intention to raise it must be made known and confirmed in the manner pointed out by the act of incorporation.

Where two corporations are created by adjacent states with the same name, to construct a canal in each of the states respectively, and afterwards their interests are united by subsequent acts of the states respectively, this does not merge the separate corporate existence of such corporations; but creates a unity of stock and interest only.

Every act of incorporation must be construed in such a manner, if possible, as not to exceed the sovereignty of the Legislature granting it. It ought not therefore to be deemed to authorize any act to be done, which would exceed the jurisdictional power of the state, or interfere with the rights of other states, as to construct a canal, or raise a dam, in another state.

Quære, if the Legislature of one state can authorize a dam locally in that state to be raised, so as to flow back a public river running into another state, to the injury of mill privileges locally situate in the latter state.

THIS was a Bill in Equity brought by the plaintiffs, the proprietors of a cotton mill situated in the town of Mendon in the state of Massachusetts, against the defendants, the pro-

prietors of the Blackstone Canal, to compel them to reduce the height of a dam across the Blackstone River, which had been raised by them, whereby the operations of the plaintiffs' mill were impeded; also, for a perpetual injunction against raising it in future, and for damages for the injury already sustained by the plaintiffs.

The material facts stated in the bill were as follows: — That, in the summer of 1825, the plaintiffs built their dam across the Blackstone River in the town of Mendon and state of Massachusetts, and erected a woollen mill, to be carried by water taken from the pond flowed by said dam; the mill and dam of the plaintiffs being in the state of Massachusetts. In March, 1826, the plaintiffs began to dig a raceway for their cotton mill, south of the woollen mill and lower down the river, and in the course of the year 1826, the cotton mill was completed; the mill, and wheels, and part of the race being in the state of Massachusetts, and the remainder and mouth of the race being in the state of Rhode Island. In August, 1828, the plaintiffs built their grist mill still further down the river, and in the state of Rhode Island. In June, 1826, the plaintiffs and defendants entered into an indenture, by which, among other things, the plaintiffs agreed, that the Blackstone Canal should cross their pond aforesaid, and pass over their land; and to release all damages therefor; and also to pay the defendants $ 500; and to support farm bridges across the canal, where the dam passed over their land; and not to draw down the water in their pond more than four inches below the cap log thereof. The defendants by the same indenture, for the considerations above cited, conveyed to the plaintiffs the right to draw water from the canal at any point of their land, and covenanted for the quiet enjoyment of this right. The Woonsocket dam, across the Blackstone River, is about one mile and three fourths below the plain-

tiffs' cotton mill. In August, 1828, the defendants raised this dam two feet for the purpose of deepening the water in the Woonsocket pond, so as to render the same navigable as a part of the canal. The raising of this dam caused back-water on the wheels of the plaintiffs' mills, so as to materially obstruct their speed. The back-water was so great, that the plaintiffs had been obliged to build another mill, called the picker mill, for the purpose of removing into it the picker and some of the heaviest machinery from the cotton mill; the wheel of the cotton mill being unable, when clogged by back-water, to carry the machinery, though, before the dam was raised, it was fully able to carry all the machinery. The plaintiffs' investment in mills, other buildings, and lands, &c., was over $ 100,000, and the value of the property depended materially upon the reduction of the Woonsocket dam to the height it stood at before it was raised. The bill prayed, that the defendants might be decreed to reduce the dam to its former height, and for a perpetual injunction against raising it in future, and for an account of damages already sustained, to be taken by a master.

The plaintiffs upon these facts, rested their case upon two grounds; first, as proprietors of mills lying in the state of Massachusetts, and second, upon the indenture; contending that the defendants, after having conveyed the right to draw the water from the canal, were estopped from so raising the Woonsocket dam, as to render the right to draw the water of no value.

The Answer of the defendants admitted, that they had raised the Woonsocket dam two feet, and contended, that they had a right to do so by virtue of their charter, and also by an agreement with the plaintiffs, who had released all damages. That by their incorporation by the Rhode Island Legislature, and by subsequent acts, they were empowered to build a

canal from Worcester to Providence, and to take land, &c., for that purpose, the damages to be appraised and reported to the Court of Common Pleas. That in pursuance of this authority, in 1825, they, by their commissioners, located the route, and marked the level, &c., of the canal, by stakes and marks on the east side of the Blackstone Canal, from above the plaintiffs' land, (which principally lay on the west side,) to the Woonsocket village; and that the route and level so marked out required that the Woonsocket dam should be raised four feet, in order to render the canal navigable. The commissioners made a report of this location on the east side, but, there being no Court in session, it never was returned to the clerk's office of said Court of Common Pleas. In the mean time, after the excavation had begun, plaintiffs entered into a negotiation with defendants, through the commissioners, to change the route of the canal at that point, from the east to the west side, in order to increase defendants' water power. This was agreed to, by means of which the plaintiffs realized great advantages, and were enabled to erect a cotton and grist mill. The answer alleged, that, at that time, it was publicly known the Woonsocket dam must be raised, and that in changing the location of the canal, the same level was preserved on the west, as had been marked out on the east side of the river. The location on the west side was made the 24th of February, 1826, the previous location to raise the Woonsocket dam having been made on the 10th of February, 1826. The defendants further set forth, that the Farnums were desirous of purchasing the Mowry land, below the land they then owned exclusively in Massachusetts, but could not effect the purchase from the Mowrys. That defendants did purchase this land to accommodate the Farnums, and conveyed the title to them for their benefit. It was also alleged, that before defendants began their raceway for their new cotton

mill, they had notice that the Woonsocket dam was to be raised, as otherwise boats could not enter the lock above, on the level marked out for the canal. The answer also alleged, that the raising of the dam did not cause the back-water on the plaintiffs' mills, but that it was caused by the raceway being too narrow to carry the water off, and in consequence of the plaintiffs having placed the apron of their cotton mill wheel lower than that of the woollen factory, and nearly on a level with the bed of the river, the plaintiffs' privilege having but little fall, and being what is termed a flat privilege. It was also averred, that one of the plaintiffs offered $ 1000 if the commissioners would not raise the Woonsocket dam; and also proposed to have flash-boards put on, instead of a permanent dam, so that they might be taken off in the winter. But nothing was done to that effect. The answer complained that the Farnums had raised the water in their pond, so as to come up to the level of the banks of the canal, and in one instance overflow them and cause the defendants to make repairs at their own expense. That the plaintiffs, sensible of the damage caused by keeping the water so high, proposed to have two gates erected at their expense, to carry the water from the canal, and that such gates were erected, and a new trench dug by plaintiffs below the gates. That subsequently the plaintiffs erected a grist mill below these gates, and entirely defeated the object for which they were erected. The answer also set forth at length, the contract between the parties, which it set up as a full release of all damages from overflowing, &c., and prayed that the defendants might be dismissed by the Court, with their costs.

The case was very elaborately argued by *R. W. Greene* and *Daniel Webster* for the plaintiffs, and *J. L. Tillinghast* and *J. Whipple* for the defendants.

STORY J. Assuming for the present, that the evidence makes out a case of real substantive damage to the plaintiffs' mills, by the raising of the Woonsocket dam, the next question is, whether the record presents any justification of the act of raising the Woonsocket dam on the part of the plaintiffs. And it is most important to the parties in this aspect of the case, to advert to some of the facts, which are indisputable. The plaintiffs, in the summer of 1825, built a dam across the Blackstone River in the town of Mendon in the state of Massachusetts, and erected a woollen mill in the same town, the water for which was drawn from the pond formed by this dam, which is called the Blackstone dam or pond. There is no doubt, that this was a legal exercise of the rights of the plaintiffs, as owners of the soil and riparian proprietors. The answer of the defendants does not attempt to impeach it. In March, 1826, the plaintiffs being the owners of the soil began to dig the race-way for their cotton mill, south of the woollen mill and lower down the river, and completed the cotton mill (which is within the boundary of Massachusetts) in the course of the same year. The land through which this race-way was laid, is known as the Mowry land, and the title to it was purchased by the plaintiffs on the 28th of February, 1826. The territorial line between Massachusetts and Rhode Island crosses the race-way just below the cotton mill. The dam at Woonsocket is in Rhode Island, and was not raised until August, 1828, and then, and not till then, did the gravamen complained of by the bill have an existence.

Now, I think, it cannot well be denied, that the acts of the plaintiffs in the erection of their cotton mill, and the use of the water from the canal and dam above it, were strictly legal. They had a right to the flow of the river in its then natural state along the banks of their land, and a right to

empty the water from their race-way into the river according to its then natural current without any obstruction by any subsequent artificial elevation or back-water, unless the Canal Corporation have acquired some legal right to displace this, which may be called the natural right, or water privilege, annexed to the proprietary interest in the adjacent soil and banks.

The defendants have thrown into their answer a great variety of incidental matters, many of which are not responsive to the bill, and some of which are not made out by any competent proofs. But, stripping the case of this complexity of circumstances, the defendants mainly rely upon two distinct grounds of defence; first, that the act of raising the Woonsocket dam is strictly justified by the authorities conferred upon the corporation by the various Acts of the Legislatures of Massachusetts and Rhode Island, which are referred to in the case; and, secondly, that, if not so justified, still the indenture of agreement between the parties of the 5th day of June, 1826, (which is also in the case,) furnishes a complete justification, from the manifest objects, which it had in view, and the known circumstances and intentions of the parties, which accompanied it.

A good deal has been said, in the course of the argument, upon the point, that the plaintiffs, at and before the time of their purchase of the Mowry land, in February, 1826, had notice, that the location of the canal had been actually made up to Woonsocket dam, and that the level of the canal at that place required the dam to be raised two feet; and so the intent of the canal proprietors to raise it, and the legal appropriation of it for this purpose, must, as necessary presumptions, follow upon such notice. Indeed, it has been contended, that this does not rest upon mere legal inference; but that direct and positive notice to this effect, as matter of fact,

is brought home to the plaintiffs. This, however, is strenuously denied on the other side; and there is, (as we shall hereafter see,) great difficulty in maintaining the affirmative upon the actual posture of the evidence.

The question of notice is not, however, of the slightest consequence, if the Woonsocket dam has been justifiably raised, under and in virtue of any authority conferred by any of the charters upon the Canal Corporation. For under such circumstances it binds the plaintiffs in point of right, whether they had notice of the intent to raise it or not. The only possible view, in which it strikes me, that the notice can be of any avail, is this. If it constituted an actual admitted ground or basis, upon which the agreement of June, 1826, was entered into between the parties, so that it would operate as a legal fraud upon that agreement to suffer the plaintiffs now to assert a right, which that agreement contemplated as extinct, or to be extinguished by its terms, it would be most material as a matter of equitable bar. In all other aspects it seems to me wholly immaterial. It can confer no right on the defendants *ipso facto*. It would be absurd to say, that notice of an intent to do a wrong amounted to an extinguishment of the plaintiffs' right to seek a remedy for such wrong; or that the plaintiffs, at the peril of losing their property, were bound to make proclamation of their intention to seek redress against wrong-doers. The argument of the defendants' counsel has not, as I comprehend it, attempted to sustain any such large position.

Let us then pass to the main grounds of the defence; and see, whether they are made out by the principles of law applied to the facts.

And first, as to the justification under the charters and other Acts of incorporation. In June, 1823, the Legislature of Rhode Island incorporated a company by the name of the

Blackstone Canal Company, and, after giving them the usual corporate powers, authorized them to locate, construct, and fully complete a navigable canal, with locks, tow-paths, basins, dams, wharves, embankments, toll-houses, and other necessary appendages, commencing at the dividing line between the states of Rhode Island and Massachusetts, and at that point, which should intersect and connect with a canal, contemplated to be made and constructed from or near the town of Worcester in Massachusetts, down the valley of the Blackstone River, to the aforesaid dividing line, and running into tide water, in the town of Providence, in such place or places as might be deemed most convenient for the company; with further authority to employ certain ponds as reservoirs and feeders, &c. &c. Many other incidental provisions were made, which it is not necessary to particularize. It was further provided (by the 11th section of the act), that whenever the corporation should have located the said canal, or any part thereof, or the feeders or branches thereto, or any of them, they should make report thereof to the Court of Common Pleas for the county of Providence, at any term thereof, wherein they should particularly describe the bearings of the intended route, or any section thereof, its width, including tow-paths, embankments, basins, wharves, excavations, the reservoirs intended to be constructed or used, and the names of the owners of the land, so far as the same could be ascertained; which report was to be placed on the files of the Court, and notice given to the owner of the land, if known; and commissioners were to be appointed by the Court to estimate all damages, which any persons, whose lands were described or mentioned in the report, should sustain, provided the canal or feeders, &c. be constructed thereon. The duties of the commissioners were then pointed out; the manner of making their report; the reservation of a right

of trial by a jury to any party dissatisfied with the report; and the mode of compelling payment of the damages, which should be assessed by the commissioners or by a jury, if not voluntarily paid by the corporation within a limited period.

The corporation were further authorized subsequently to make any alteration in the canal or feeders so located; and the proceedings in respect to the alterations and the damages occasioned thereby, were to be the same as upon an original location. And inasmuch as the Legislature of Massachusetts had at their January session, in 1823, created a corporation, by the name of the Blackstone Canal Company, for the purpose of building and constructing a canal from the town of Worcester to the line between the states of Massachusetts and Rhode Island, and it might be convenient to unite their stocks, it was further provided (by the last section of the Act), that the subscribers to the petition for the Rhode Island Corporation, with the express assent in writing of the Massachusetts Corporation, might authorize subscriptions to be opened for stock for the purpose of building a canal from Worcester to Providence; and that such subscribers should be deemed and taken to all intents and purposes as members of this (the Rhode Island) Corporation. And that the money so raised, or raised by the sale of any future stock or shares, might be expended upon any part of said canal from Worcester to Providence, or any of its appendages. And all officers and committees chosen by said subscribers should be officers of this corporation; and all books and records kept under the authority and direction of such subscribers, and all meetings, regular or special, whether in Rhode Island or Massachusetts, should be deemed and taken to all intents and purposes to be legal proceedings by this corporation.

Amendatory Acts were passed by the Legislature of Rhode Island, in January, 1826, in May, 1827, and in June, 1827.

By the Act of January, 1826, it was provided, that the commissioners appointed under the 11th section of the former Act, should be authorized, *whenever the canal together with its feeders and reservoirs should be completed*, to give notice to all persons to file their claims for or on account of the *detention*, *reservation*, *division*, and *use*, by the said corporation, of the flood waters of the Moshassuck River, and of the Blackstone River, and their branches and tributary streams, and feeders; or on account of the *retention*, *reservation*, *division*, and *use* of the *usual* and *natural run* of *said rivers*, or of any of their branches and tributary streams or feeders, whenever the same is not wanted for the use of any mill or mills now erected, or hereafter to be erected on dams already built on said rivers, &c.; or by reason of the appropriation and use, by the corporation, of the lands of any person for boat basins or other necessary uses of the said corporation, according to the powers of the charter. And the commissioners were authorized to report the damages in such claims, and a final adjudication was to be made thereon in the manner pointed out by the act. And it was expressly provided, that so much of the former act as authorized the corporation to reserve and keep back the usual and natural run of the Blackstone River, &c., should be repealed; and that the corporation should be authorized to *detain*, *reserve*, *interrupt*, *use*, or *divert* any part of the *usual run of said river*, &c., provided they did not flow back on the wheel of any mill or any dam then built on the said river in the state of Rhode Island, only at such times when the same shall not be wanted for the use of any mill now erected or to be erected on any dam already built.

The Act of May, 1827, declared, that the stockholders in the Massachusetts Blackstone Canal Company should be stockholders in the Rhode Island Company, as if they had originally subscribed thereto, if both corporations should before

the first day of July next agree thereto; and that the books and proceedings of the original and associated stockholders should be deemed the books of both corporations. The Act of June, 1827, extended the time for the Massachusetts Corporation to signify its acceptance to one year from the passage of the act.

Such is the substance of the Rhode Island Acts; and it was under those of June, 1823, and January, 1826, that the canal from Providence to Woonsocket dam was (as is suggested) laid out and located by the commissioners of the Canal Corporation; and the Report thereof presented to the Court of Common Pleas for the County of Providence at May Term, 1826; and final proceedings had thereon according to the requirements of the Rhode Island Acts.

It might naturally be supposed, that as Woonsocket dam was within the territorial limits of Rhode Island, the authority to raise that dam would be derived from, and exercised under the Acts of Rhode Island abovementioned. But this has been utterly disclaimed on the part of the defendants at the argument. On the contrary, they admit, that the state of Rhode Island possesses no legislative authority to authorize the raising of any dam locally within that state, whereby the waters of the river may be flowed back to the injury of a mill or mill privilege locally situated in Massachusetts. The Court is thus spared the investigation of this delicate and important question of law, upon which it would certainly not be desirable to pass any judgment, except after the most ample discussion and investigation.

Independently, however, of the admission of counsel, there would be extreme difficulty in maintaining, that there had been any valid or legal appropriation for the raising of Woonsocket dam, under the Rhode Island Acts, however broad might be the authorities conferred by them. In the report

made in May, 1826, and which alone, (after it was duly confirmed and acted upon,) would in law fix the location of the canal, not a syllable is to be found respecting the levels of the canal, or the raising of Woonsocket dam, or the intention to flow back the waters of the Blackstone River. Now, however ample may be the powers given by the Rhode Island Acts to the Canal Corporation, to construct their canal, to raise dams, to form levels, and to flow back the waters of the river, those powers must be exercised in the manner pointed out by those Acts, before there can be any legal appopriation or location for these purposes. Acts *in pais* indicating such an intention are not sufficient. They must assume a legal and permanent form. They must be reported to, and acted upon, by the proper judicial tribunals, in the manner pointed out in those Acts. There being, then, no statement on the face of the report of January, 1826, that Woonsocket dam was to be raised or appropriated for that purpose, or that the waters of the Blackstone River were there to be flowed back, it is difficult to perceive, how any such appropriation can be made out *arguendo*, or by inference from matters and presumptions *in pais*. It seems to me, then, perfectly clear, that the report of May, 1826, could not justify the raising of Woonsocket dam. Indeed, the defendants manifestly so understood their own rights, in the report of August, 1827, made to the Court of Common Pleas for Providence County; for that report expressly claims the right of raising Woonsocket dam two feet higher, for the purpose of obtaining a safe navigation in the mill-pond and river above, and obtaining a reservoir of water for the use of the canal, and requires the damages to be assessed by commissioners, which were thus sustained by the persons, owning *the lands* and *dams* specified in the report, (the plaintiffs' not being included,) viz. "all damages sustained by all other persons than those above named,

by flowage of land, to be hereafter located and appraised." It does not appear, that any application has since been made for the ascertainment of any such damages so occasioned by flowage to other persons. Indeed, the actual raising of Woonsocket dam not having taken place until August, 1828, it was indispensable for the defendants, if they meant to justify themselves, to have made report thereof according to the Act of January, 1826, and to have had the damages by the flowing back of the water duly ascertained and finally liquidated. It does not appear, that they have ever so done.

There is, too, a peculiarity in the Act of January, 1826, which deserves notice. In the second section of the Act, that part of the sixth section of the Act of 1823, which authorized the Canal Corporation to reserve and keep back the usual and natural run of the Blackstone River, &c., is expressly repealed; and in lieu thereof authority is granted to detain, reserve, interrupt, use, or divert any part of the usual run of said river, &c., "provided they do not flow back on the wheel of any mill or any dam now built on said river in this state, &c., only at such times when the same shall not be wanted for the use of any mill or mills now erected, or hereafter to be erected on any dam already built." — An equally just solicitude might well be presumed to exist, on the part of the Legislature of Rhode Island, not to allow any interference with the rights of the owners of mills or dams on the Blackstone River locally situate in Massachusetts.

These remarks have been simply to show, that the considerations growing out of them have not escaped the attention of the Court. But, as has been already observed, no justification being attempted at the argument under Rhode Island Acts, it is unnecessary to follow them out to their natural consequences.

We may, then, turn to the Massachusetts Acts of incorporation; and inquire, whether they justify the raising of Woon-

socket dam, and the flowing back of the waters upon the plaintiffs' mill. — The original Act of incorporation by Massachusetts, was passed in January, 1823; and it incorporated certain persons named therein, by the name of the Blackstone Canal Company, with the usual powers of bodies politic, authorizing them to construct a navigable canal, &c. &c., commencing in or near the village of Worcester, down the valley of the Blackstone River in a direction towards tide-waters, to the boundary line between the states of Rhode Island and Massachusetts. By the eighth section, the corporation were authorized, after location of the canal, or any part thereof, to report their doings to the Court of Sessions for Worcester County, describing the route, width, tow-paths, embankments, basins, wharves, excavations, and reservoirs, and the owners of the lands, so far as they could be ascertained. Notice thereof was to be given by the Court, and commissioners were to be appointed by the Court to assess the damages to the owners of the land, with a reservation of a right of trial by jury to all persons dissatisfied with the report of the commissioners, otherwise the report, upon being accepted by the Court, to be conclusive. Remedy was also provided for cases of non-payment of the damages so assessed. Power was also given to alter the route or location of any part of the canal. The other provisions of the Act are not material to be stated.

By an Act passed on the 7th of February, 1824, the Massachusetts Legislature further authorized the Massachusetts Company to open books for subscriptions of stock to construct a canal from Worcester to tide-waters in the town of Providence in Rhode Island, and to create if necessary new stock for the purpose. And the new subscribers were declared to be members of the corporation, and the corporation were authorized to expend the funds raised by the new stock on any part of the canal.

By an act of the 4th of March, 1826, the Legislature of Massachusetts further authorized the commissioners appointed by the eighth section of the Act of incorporation, "to appraise all damages accruing to any person or persons, corporation or corporations, by reason of flowing his, her, or their land by said Canal Company, for their use; also to appraise all damages accruing to any person or persons, corporation or corporations, by reason of the detention or diversion of any water from said person or persons, corporation or corporations, who may have a legal right to the same;" with a proviso, that the claim for damages should be filed in the Court of Sessions for Worcester County within one year from and after the flowing, detention, or diversion as aforesaid, otherwise they were to be barred.

By an additional Act, passed on the 20th day of February, 1827, it was enacted, that, after the first day of July then next, the stockholders in the Blackstone Canal Company in Rhode Island, and incorporated by that state, should be constituted stockholders in the Blackstone Canal Company created in Massachusetts, with the powers, rights, and privileges of original subscribers. Other auxiliary provisions were made; but the union of the two corporations was to take place only upon the acceptance of the provisions by each corporation under the authority of the respective legislative Acts of each state. In pursuance of the legislative Acts of each state, the two companies became thus united by an acceptance of the terms of those Acts, the Rhode Island corporation having agreed thereto on the 25th of June, 1827, and the Massachusetts corporation on the 26th of December, 1827. The union, then, not being complete until the last mentioned period, it follows, that all antecedent acts done must be deemed to have been done by the respective corporations under their respective and distinct Acts of incorporation. This view of the matter would, therefore, exclude (if no other difficulty ex-

isted) all right to consider the acts done in virtue of the reports made to the Court of Common Pleas of Providence County in May, 1826, and in August, 1827, as being of any validity, as acts of the Massachusetts Corporation, or as done with the assent or co-operation of the latter.

Although in virtue of these several Acts, the corporations acquired a unity of interests, it by no means follows, that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, as before, according to their respective Acts of incorporation. Neither could exercise the rights, powers, or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The Acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations, acting within the sphere of their respective charters for purposes of common interest, and not as a case, where all the powers of both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation.

Let us see, then, how far the raising of Woonsocket dam in Rhode Island was authorized by the Massachusetts Acts of incorporation. Now, the general rule certainly is, that every legislative Act ought to receive a reasonable construction; and it cannot be presumed, that a legislature authorizes any act to be done in a foreign territory, when that act is beyond the reach of its proper jurisdiction or sovereignty. Every legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty. Unless, then, there is on the face of the Massachusetts Acts some plain clause authorizing the raising

of this dam, it cannot be implied from the ordinary language of those Acts. It cannot be presumed, that the Massachusetts Legislature meant to exceed its legitimate authority. The original Act of incorporation in 1823, is manifestly confined to objects and purposes connected with the construction of a canal from Worcester to the Rhode Island boundary line. The raising of Woonsocket dam was not included within the scope of that canal. It was not within the termini of it.

The supplementary act of February, 1824, does not change or enlarge this purpose; but only authorizes the subscription and sale of new stock to be made, and the application of these new funds to the making of any part of the canal from Worcester to tide-water in Providence. It does not authorize the corporation to construct such a canal beyond the territorial limits of Massachusetts; but only provides that any application of its new funds, for such a purpose, shall not be deemed a maladministration or malappropriation of them. The subsequent union of the two corporations in point of interest and stock does not, as has been already stated, vary this result.

The only reports of locations of the canal made to the Court of Sessions for Worcester County, under the authority of the Massachusetts Acts, are as follows: First, a report made to the Court at November term, 1825, and finally acted upon, with the proceedings thereon, at September term, 1826, by which "so much of the location and report as relates to a dam to be constructed on the top of a dam now belonging to the Blackstone Manufacturing Company, across the Blackstone River in the town of Mendon, and now used by the said company," was allowed, accepted, and recorded. This report does not in the slighest degree touch any question as to raising Woonsocket dam. Secondly, a report of locations made to the Court at December term, 1826, and finally,

with the proceedings thereon, acted upon at March term, 1827, by which, among other things, the canal was laid out and located through the defendants' land to the boundary line between Massachusetts and Rhode Island. And here, again, no mention occurs of any raising of Woonsocket dam, or of any damages for flowage to be estimated therefor.

So that in point of fact, supposing that under the Massachusetts Acts Woonsocket dam might have been located and raised, and the compensation ascertained for any flowage occasioned thereby, in the manner pointed out by those Acts, (which is admitted only for the sake of argument,) no such location has been made and confirmed, and no such compensation ascertained and fixed, as these Acts require to give validity thereto. There is, then, a total failure of any one execution of the proper authorities, (supposing them to exist,) to justify the raising of Woonsocket dam by the defendants, under the Massachusetts Acts. In fact, that dam was not, (as has been already stated,) raised until August, 1828; and even if the union of the two corporations in December, 1827, were as complete and perfect, as the defendants contend, so as to constitute thereafter a single corporation; still, there is no legal location thereof by the corporation, confirmed by any court of Massachusetts, either before or subsequent to that period, which gives any legal validity in point of property or right to the raising of Woonsocket dam.

It appears to me, then, upon this short view of this part of the case, that the defendants have not shown any justification under the Massachusetts Acts; and they pretend to none under the Rhode Island Acts.

Let us see, then, whether the indenture of agreement between the plaintiffs and the defendants of the 5th of June, 1826, furnishes any justification of the defendants, or any bar to the relief sought. At the time when this agreement

was entered into, the canal had been laid, and staked out by the canal commissioners, (though not finally located by any judicial acceptance thereof,) from the pond of Woonsocket dam to the Blackstone Company's dam in Mendon on the east side of the Blackstone River. The plaintiffs were at that time the owners of the land on the west side of the river from and to the same *termini*, they having purchased the Mowry land in the preceding February. The principal object of the negotiations, which ended in the above agreement, were, to change the contemplated route of the canal from the east to the west side of the river, so as to pass through the plaintiffs' lands between the Woonsocket dam and the Blackstone Company's dam. Accordingly, at the time of the agreement, as is apparent from the recital, the route had been changed by the Canal Corporation to the west side, and staked out; and the main objects apparent upon the face of the agreement are to secure to each party equivalent advantages for the change of the route, and the benefit derivable therefrom. The plaintiffs agree to exonerate the defendants from building any bridge over their land, where the canal shall pass; to build and maintain a suitable bridge at their own expense; to pay the corporation $500 towards the building of a bridge across the Blackstone Company's pond; to build a bulk-head across their trench at its junction with the canal; to hoist their gates and stop their mill for a fortnight to enable the corporation to build their bridge and guard-gates; and further, not to draw down the water more than four inches below the cap-log of their dam, so that boats in the canal may not be impeded in the navigation, except in cases of necessary repairs. And finally, they agree to release to the corporation all damages for making and continuing the canal through their land, and all damages, which may arise from the flowing of land belonging to them on the

west side of the east bank of the canal, and all damages which may arise from removing earth beyond necessary excavations to make embankments for the canal in their land. In consideration of these covenants the corporation grant to the plaintiffs, and their heirs and assigns, the right to draw and use water from the canal for any purposes, and at any points on the land of the plaintiffs, provided they do not draw and use the water, so as to remove it at their dam more than four inches below the cap-log of the same dam; the plaintiffs agreeing to build and maintain a bridge across the tow-path of the canal at each point, where they draw the water from the canal through the tow-path thereof.

Such is the substance of the indenture. And it is not a little remarkable, that though many things are minutely provided for, and especially a release of damages occasioned by flowage of the plaintiffs' land on the west side of the east bank of the canal, not the slighest allusion is made to the raising of Woonsocket dam, or to any damages to the plaintiffs consequent thereon. This omission is the more remarkable, because the plaintiffs in the preceding May had begun to dig the race-way for their cotton mill; so that the possible injury to that race-way and mill by the flowing back of the waters of the river could scarcely have escaped the observation of all the parties. It would seem almost incredible, that a very expensive mill should be about to be erected under such circumstances, without some solicitude being manifested on so important a subject. Be this as it may, it is very certain, that the indenture makes no provision on the subject of raising Woonsocket dam, or of a waiver of damages consequent thereon; and it is difficult, therefore, in a legal point of view to perceive, what bearing it has, *per se*, upon the present controversy. As an agreement on another subject, it can have no legal tendency to bar or impair the

plaintiffs' rights. If it is to operate as a bar, it must be from other collateral considerations; not from what it does contain; but from what it does not contain.

First, it is said by the counsel for the defendants, that, before this agreement was made, the plaintiffs had full notice of the intention of the Canal Corporation to raise Woonsocket dam; and that the agreement was entered into under that, as an implied term or condition of the change of the location of the canal from the east side to the west side of the river. It is said, that the canal was staked out, and its levels *de facto* marked out, so that they could not escape general notice; and that this notoriety is brought home to the plaintiffs. But, as has been already suggested, there is great difficulty in sustaining this position, as matter of fact. If the raising of Woonsocket dam was absolutely decided on, and fixed, in the autumn or winter of 1825; if there was then a positive location of Woonsocket dam for this purpose; how has it happened, that the report of May, 1826, makes no mention of such location? It was most material to be stated. It has been said, that the staking out of the route of the canal, and of the lands were, *per se*, acts of appropriation of the route and levels; and that all, that the law requires, is, that, within a reasonable time, the route and levels and locations should be reported to the proper judicial tribunal for confirmation and ulterior proceedings. But I am clearly of opinion, that though, by the staking out of the route and levels and location, an inchoate title may vest in the corporation, if the ulterior judicial proceedings are pursued; yet, until these proceedings are had, and consummated, no complete title can vest in the corporation. They cannot take private property, or entitle themselves to do injury by flowage to the rights of third persons, until they have pursued and finished all the steps contemplated by law. Now, up to this very hour, no

such ulterior proceedings have been had in respect to the flowage occasioned by the raising of Woonsocket dam. There has been no return made to any court of any location thereof, with a view to the question of damages by flowage to persons in general. It appears to me impossible, therefore, that there can have vested any title in the corporation by the mere staking out of any route, or lands, where there has been no judicial confirmation of their acts *in pais*, so as to bind the rights of parties in the manner contemplated by law. Notice, then, if it were proved, of an intention to do the act, would not (as has been already stated), if the act has not acquired a legal validity, justify it. Nor am I at all prepared to admit, that a marking out of the levels of the canal would have been, even if followed up by ulterior proceedings, equivalent to a location of Woonsocket dam.

But, to recur to the fact of notice, I am not persuaded, that it has been brought home to the plaintiffs. There is, to say the least of it, so much room to doubt it, that it is incumbent on those, who assert any legal rights under it, to establish it by some testimony more stringent and pressing, than any which has, as yet, been produced to the Court. In a conflict of testimony, if notice be brought into reasonable doubt, that alone would justify the Court in refusing to act upon it, as an established fact.

Then, in the next place, if the fact of notice were more clear than it is, did the other ingredient exist? Did the plaintiffs understand, and by implication admit, that Woonsocket dam should be raised, so that it was assumed as a basis of the indenture of June, 1826? Unless it was so assumed, and a departure from it would now operate as a virtual fraud upon the Canal Corporation, I do not perceive, how the fact of notice, (as has been already suggested,) can conclude any thing in the case. It appears to me, that the

Canal Corporation have not, by any proper evidence, established this most important fact. It is true, that it is asserted with great strength and directness in their answer, not only that at the time of making the indenture there was an intention to raise Woonsocket dam by the Canal Corporation, but that it was then actually located and appropriated for this purpose; that the Mowry land had been purchased by their agent for the express purpose of avoiding any liability to pay damages for flowage upon that land; that the subsequent conveyance to the plaintiffs of the Mowry land was made under an implied notice or reservation to this effect; and that the raising of Woonsocket dam was fully known and understood by all the parties as the basis, upon which that indenture proceeded. But these statements, though found in the answer, not being responsive to any allegations in the bill, but matters set up in justification, are not, *per se*, evidence, because they are in the answer. *They must be established by proofs, aliunde;* and I am of opinion, that no sufficient proofs exist in the case for this purpose.

It seems, indeed, admitted, that notice would not, *per se*, confer any right on the corporation. But it is said, that it will deprive the party of all claim for damages done to subsequent improvements made by them after such notice. It does not appear to me, that this proposition can be maintained consistently with the principles of law. Every man has a right to use and improve his own property according to his own pleasure, without let or obstruction; and notice of an intended injurious act, if unlawful, cannot narrow this right, and exempt the party from full responsibility in damages. It is at the party's own peril, that he assumes to do any illegal act, which consequentially or directly affects the property of another. No man by giving notice of an intention to obstruct a stream, and thereby to flow back the water upon

the riparian proprietors, can exempt himself from damages to the full extent of all the injury done, when the obstruction is completed.

Then, again, it has been said, that the reason for the total silence of the indenture on the subject of raising Woonsocket dam is, that it was a part of the antecedent agreement, of which there was already a part-performance by the location of the levels of the canal, and the transfer of the route to the west side; and *therefore* it was unnecessary to stipulate respecting it. But no such antecedent agreement is established in point of fact, of which the indenture constituted an unexecuted fragment. On the contrary, the indenture proceeds upon the admitted fact, that the canal was already staked out on the west side of the river; and the whole scope of the covenants on each side is for reciprocal benefits and advantages consequent upon that fact. The covenants do not allude to it, as the consideration for the covenants of the plaintiffs; but these covenants are "in consideration of the covenants and grants herein contained *to be performed* and made by the corporation." And where there have been antecedent negotiations on a subject, which have ended in a written agreement, there is no small difficulty in considering them as still a subsisting part of the agreement. Many of the mischiefs growing out of the admission of parol evidence to explain, control, or add to written instruments would be thus immeasurably extended. If there are any cases, in which this may be done, they are cases of a peculiar character, where fraud, or some other equivalent ingredient, is presented to the consideration of a court of equity. Nothing short of the most clear and convincing proofs would justify the engrafting of such a parol contract upon the terms of a written instrument. The very silence of the present indenture is most significant against the presumption of such a pa-

rol contract and part-performance; since the very groundwork of the argument rests on the supposition, that it was the main consideration of entering into it. There could be no part-performance, until the dam was actually located and raised; or until there was some release of all claim to future damages therefor by the plaintiffs. Until some act of this sort was done on either side, with the assent of the other, the agreement must remain executory; and its fulfilment could be absolutely secured only by incorporating it into the very substance of the indenture.

If, then, the written agreement does not touch the case; if notice cannot, *per se*, confer any right on the corporation, or bar any claim for damages by the plaintiffs; if no parol contract, operating to bind the plaintiffs, as a matter of fraud upon the corporation, is established, we are driven back upon the Acts of incorporation for a justification; and these, as has been already shown, under the circumstances, furnish none. The consequence is, that the corporation have no right to do the act; and if the raising of Woonsocket dam has been injurious to the plaintiffs, by flowing back the water, to the obstruction of their mill wheels, they are entitled to relief.

The remaining inquiry then is, whether, as matter of fact, the injury, stated in the bill, has been occasioned by the raising of Woonsocket dam. And I am of opinion, that it is so established by a strong and decisive preponderance of the evidence. I do not go over the particulars. But the result is that, which has been announced.

What then is the relief, to which the plaintiffs are entitled? All claims for damages in this form of proceeding are expressly abandoned by the plaintiffs, and therefore need not be made matter of discussion. The relief must be specific. The nuisance, to the extent of the injury, must be abated, and a perpetual injunction awarded against any future raising of

the dam, or keeping up its height to the injury of the plaintiffs. For this purpose, it will be necessary to refer it to a master, to ascertain, how much the dam ought to be lowered, not exceeding the two feet, in order to remove the injury to the plaintiffs; and upon his report coming in, further proceedings must be had, to give full effect to the decree of the Court. An interlocutory decree for this purpose will be accordingly entered.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1831, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

THE BRIG NESTOR, THOMAS MERRILL, CLAIMANT.

The Admiralty has jurisdiction *in rem* for supplies furnished by material-men to foreign ships in our ports, to our ships in foreign ports, or in the ports of other states.

The giving credit for a fixed time for the supplies does not extinguish the lien for the supplies; nor the allowing the ship to depart from the port on her voyage without payment.

The fact, that the master and owners are personally liable for the supplies, does not destroy the lien; for the party may trust to the credit of the ship, the master, and the owner.

THIS was the case of a libel *in rem* brought by a material-man for certain supplies, and especially for a cable furnished to the brig *Nestor*. The articles, amounting to the value of $ 168·46, were furnished at Alexandria in the District of Columbia, by the libellant, Lincoln Chamberlain, a resident merchant there, at the request of the master of the brig, then lying in that port, but belonging to the port of Portland in the state of Maine, and bound on a voyage from thence to

other ports. In the District Court there was a decree in favor of the libellant, charging the vessel with the value of the cable, and rejecting the claim for the other supplies. From that decree the respondent appealed to this Court; and the question here was of course narrowed down to the point, whether the cable was necessary; and, if so, whether under all the circumstances the proceeding *in rem* could be maintained. At the argument, the necessity of the cable seemed not susceptible of doubt; and the controversy turned almost entirely on the other point.

The case was argued by *William Pitt Fessenden* for the libellant, and by *Daveis* for the claimant.

Story J. In respect to the right, in point of jurisdiction, of maintaining this suit *in rem* in favor of material-men, it does not appear to me, that there is any well-founded objection. The Admiralty has, as I conceive, a clear jurisdiction to maintain such suits, whenever the supplies have been furnished to the vessel in a foreign port; and every port is foreign to her, which is not in the same State, to which she belongs. So the doctrine was laid down in the case of *The General Smith* (4 Wheaton R. 438,) and it has never, to my knowledge, been in the slightest degree departed from.[1] Upon principle it appears to me equally clear. If ever an occasion should require it, I should not shrink from the duty of vindicating this doctrine in its full extent. But until the Supreme Court has justified me in sustaining a doubt, I shall content myself in following the doctrine, which it has deliberately avowed, as a duty most appropriate for one, who is called upon to administer the law under its guidance.

[1] See also the case of The St. Jago de Cuba, (7 Wheaton R. 409, 415, 416, 417.) Abbott on Shipp., P. II. ch. 3, § 15, note (1.) of Am. editor, p. 115, 116. See also 1 Bell, Comm. 525, 526, 527. 2 Bell, Comm. 39.

The only real question in this cause, is whether there are any circumstances, which show, that the general right to provide *in rem* has been displaced or waived.

It is, in the first place, said, that here a personal credit was given to the master, excluding any credit to the owner or to the ship. Now I agree, that if the libellant has given an exclusive personal credit to the master, he cannot afterwards, upon any change of circumstances or opinion, resort to the ship, or shift the responsibility over upon the owner. But *primâ facie* the supplies of material-men to a foreign ship, that is, to a ship belonging, or represented to belong, to owners resident in another state or country, are to be deemed to be furnished on the credit of the ship and the owners, until the contrary is proved. This appears to me the result of the authorities, many of which are referred to in Lord Tenterden's Treatise on Shipping, and in the notes of the American editor.[1] There is certainly a total absence of all proof, that any exclusive credit was given, or intended to be given, to the master. It is not sufficient to show, that the master himself may be personally liable; for he is in all cases so liable for supplies and necessaries furnished for the ship, unless the credit be exclusively confined to the owners. The owners may be liable, notwithstanding the master is also liable for such supplies and necessaries.[2]

But the case does not rest upon the mere want of any evidence to establish an exclusive credit given to the master; for, if the master's testimony is competent, there is the most positive proof to the contrary. He swears in direct terms,

[1] Abbott on Shipp. P. I. ch. 1, § 11; pp. 18, 19, note (1). Id. P. I. ch. 3, § 8, note (1); p. 76. Id. P. II. ch. 22, § 1, 2, note (1), p. 100. Id. P. II. ch. 3, § 15, note (1), p. 116; § 16 and note.

[2] Abbott on Shipp. P. II. ch. 3, § 1, 2, 3, 4. Id. P. I. ch. 3, § 8, note; § 15, note.

that he purchased the cable "on a credit of ninety days on account of the brig Nestor and owners." An objection, however, is taken to his competency; and it is argued, that he cannot be a witness, where the verdict would establish any thing in his favor or against him; or where it might be simply given in evidence to establish any thing for him or against him. Considered merely in the light of master, it is difficult to perceive any solid ground against his competency. He is but an agent; and the case resolves itself into the common case of an agent offered to prove the acts done under his agency. An objection of that sort has been so many times overruled, that it is not now open to controversy.

But it is said, that he was also charterer of the brig for the voyage, under a written agreement in the case. Let us see, then, what is the nature of that agreement. It purports to be between the owners and the master, whereby they let the brig Nestor to him, "for a voyage from Portland to Eastport and St. Andrews, on the British lines, for a cargo of plaster, and from thence to one or more ports in the United States, and from thence to any permitted port or ports on the globe, if he can obtain a fair, good freight, and back to the United States and to Portland; *the owners to pay all necessary repairs on said brig, for sails and rigging.*" And the master agreed "to pay to the owners one half of all the gross freights and passage-money made during the voyage and voyages aforesaid;" and further, "to pay from his half of his earnings all wages, provisions, port-charges, &c., during the said voyage; and to deliver the said brig Nestor up to them or their order when called for, together with all her appendages received, wear and tear excepted." This is the substance of the agreement, there being only one other clause, providing for the reduction of tonnage, and custom-house fees, and pilotage, from the gross freight and primage, if the brig

should obtain a freight from the southward to a foreign port. Now, it is argued, that this agreement constituted the master owner of the brig for the voyage, and made him primarily and exclusively liable as owner for the cable. But assuming the effect of this agreement to be to constitute the master owner for the voyage for some purposes, (on which, however, no opinion is intended to be given,) yet it is plain, from the terms of the instrument, that the repairs for sails and rigging were to be at the expense of the owners. A cable is plainly a part of the rigging of a vessel; and so the parties understood the language of the agreement; for when, in a prior part of the voyage at Eastport, a cable and anchor were lost, the latter (an anchor) was supplied by the owners, and the brig worked her way to Alexandria with a poor hemp cable then on board. Indeed, the owners do not now set up any *defence against their original liability to pay some person for* the cable; but insist, that it has been already allowed for in their settlement with the master.

If, then, the owners were by their agreement bound to pay for the repairs and rigging, in what manner is their general liability affected by that agreement? There is no pretence to say, that the contents of the agreement were ever communicated to the libellant; and if they had been, it would be difficult to conjecture, how that circumstance would prove, that the libellant waived all remedy against them, and trusted exclusively to the credit of the master. They admit their liability for repairs, on that instrument; and therefore the master acted as their agent in procuring them. It might have been very different, if the master had been under a known engagement to make all repairs during the voyage. Take the case either way, then, it furnishes no ground for a presumption, which can exonerate the owners. If the agreement was not communicated, the libellant must be presumed to have

trusted to the general credit of the owners, in the absence of all counteracting circumstances. If it was communicated, then the implied obligation to provide for repairs in the given case, notwithstanding the letting of the brig for the voyage, is explicitly retained by the owners. The master, then, is not, as charterer for the voyage, an incompetent witness; for, in regard to the purchase of the cable, he acted merely as agent for the owners. He was not liable therefor in his character as charterer; but, if at all, only in his character as master. The posture of the case is not, then, in the slightest degree varied by the introduction of the agreement.

But I wish to guard against any inference, that, if the master had been charterer and owner for the voyage for all purposes, he would not have been entitled to hypothecate the ship for any necessary supplies or repairs. I know of no principle, which disables a master by being charterer from exercising the common right of hypothecation, either express or implied, under the maritime law. The owners by trusting him, or any other charterers, with the management and navigation of the ship during the voyage, trust him and them with the usual powers in cases of necessary repairs and supplies. A material-man, who furnishes supplies in a foreign port, or to a foreign ship, relies on the ship itself as his security. He may, if he pleases, insist upon a bottomry bond with maritime interest, as the security for his advances; in which case, he gives credit exclusively to the ship, and must take upon himself the risk of a successful accomplishment of the voyage. But if he is content with receiving the amount of his advances and common interest, he may rely on that tacit lien or claim, which the maritime law gives him upon the ship itself, in addition to the personal security of the owners. Wherever a lien or claim is given upon the thing by the maritime law, the admiralty will enforce it by a proceeding *in rem*; and, indeed, it is the only court competent to enforce it.

The general maritime law, giving this lien or claim upon the ship for supplies, makes no distinction between the cases of domestic and of foreign ships, or between supplies in the home port and abroad.[1] The rule was doubtless drawn originally from that common fountain of jurisprudence, the civil law, to which the common law, as well as the law of continental Europe, is so largely indebted. The civil law declared, *Qui in navem extruendam vel instruendam credidit, vel etiam emendam, privilegium habet*, (Dig. Lib. 42. 5. 26.); and again, *Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel instruendæ causa, vel quoquo modo crediderit, vel ob navem venditam petat, habet privilegium post fiscum*, (Dig. Lib. 42. 5. 34.)[2] This doctrine was easily transferred into the early codes of maritime nations, from its general convenience, and the sound policy of multiplying the resources of credit of the masters and owners of ships in cases of necessity; and we find it accordingly soon recognised as a principle pervading the maritime law, and giving confidence to the intercourse of different nations by navigation.[3]

For a long period the same doctrine was fully recognised and acted upon by the Admiralty Courts of England without interruption. And though it can no longer be deemed in force, in regard to materials supplied to domestic ships in their domestic ports; yet, as a part of the maritime law, it is still applied to foreign ships in our ports. And the lien acquired in other states under that law, for supplies to our own ships

[1] 2 Bell, Comm. 525, 526, 527.

[2] Pothier, Pand. Lib. 42, tit. 5, § 33. Id. Lib. 20, tit. 4, per tot.

[3] See Roccus de Nav. et Naul. n. 91, 92, 93. Domat, Civ. Law, B. 3, tit. 1, § 5. Consolato del Mare, ch. 32. Emérigon on Maritime Loans, ch. 12, § 1, 2, 3, 4. 2 Brown, Civ. and Ad. Law, 142. 1 Valin, Comm. Lib. 1, tit. 14, art. 16. Abbott on Shipp. P. II. ch. 3, § 10. 2 Bell, Comm. 525, 526, 527.

while abroad, are recognised and enforced in our Admiralty Courts, upon the general principles of that comity, which pervades the maritime courts of all countries.

But it is said, that, here, a credit of ninety days was allowed upon the purchase of the cable, aad that such a credit is wholly inconsistent with the existence of any lien on the ship. This objection is founded upon a notion, that the liens given by the maritime law are governed exactly by the same principles, which regulate common-law liens. It is certainly true, that by the common law a lien imports, that the party, who claims it, is in possession of the thing, and his lien is neither more nor less than a right to detain it, until his claim is satisfied. So that, where there is no possession, actual or constructive, there can be no lien. Lord Tenterden[1] lays down this doctrine in very broad terms, and in a general sense it is well founded. For instance, if a shipwright has repaired a ship, while it is in his possession he has a lien on it for the amount of the repairs; but, if he once parts with the possession, his lien is gone. And if he never has had possession of the ship, he never has acquired any lien whatever. So, if the nature of his contract excludes the implication, that the parties intended any lien, the same result follows; for it is competent for parties to waive a benefit of this sort. If, therefore, he undertakes to repair a ship, and receives possession, and he is to give credit for the amount of the repairs for a certain period; the giving of such credit is sufficient to repel the presumption of a right of lien; for it cannot be supposed, that the parties intended, that the shipwright should retain the possession of the ship, and prevent her employment by the owner during the whole time of the credit. The giving of credit under such circumstances is incon-

[1] Abbott on Shipp. P. III. ch. 1, § 7. Id. P. II. ch. 3, § 10, 15, 16.

sistent with the lien, because it supposes, that the credit is for the benefit of the owner; which it cannot be, if he is to be excluded from the possession and use of his ship. The law, therefore, in such cases interprets the contract between the parties upon rational principles; and deems the lien waived by consent.[1]

It is obvious upon the slightest consideration, that this qualification of the doctrine of lien, founded on and accompanying the possession of the thing, cannot be applicable to claims, which neither presuppose, nor originate in possession. Indeed, such claims are not, in a strict sense, liens, though that term is commonly used in our law to express, by way of analogy, the nature of such claims. Language is in this way perpetually deflected from its original meaning, and applied to things, which have a strong similitude, but not a perfect identity. Some obscurity too is thrown over the subject by the use of language borrowed from the civil and foreign law, and applied in a sense not exactly correspondent with the sense, in which it is found in that law. In the civil law the term *pignus* [pawn] was in an accurate sense applied to cases, where there was a pledge of the thing, and possession was actually delivered to the person, for whose benefit the pledge was made; and *hypotheca* [hypothecation], where the possession of it was retained by the owner. And *pignus* was especially used in such cases, where the thing was a moveable. The Institutes of Justinian notice this distinction. *Nam pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit. At eam, quæ sine traditione, nudâ conventione tenetur, proprie hypothecæ appellatione contineri dicimus.*[2] And this dis-

[1] Abbott on Shipp., P. 2, ch. 3, § 15, and note.

[2] Inst. Lib. 4, tit. 6, § 7. Dig. Lib. 13, tit. 7, l. 35. Halifax, Anal. Civ. Law, 63. Vinnius ad Inst. Lib. 4, tit. 6, § 7, p. 800, etc.

tinction, though not always strictly adhered to in the language of the commentators, was a leading one. But in each case, the same remedies belonged to the pawnee, whether it was a *pignus* or *hypotheca*, for in each case he had a right to the hypothecary action. *Inter pignus autem et hypothecam, quantum ad actionem attinet, nihil interest.*[1] By the civil law there might also be a *pignus* and *hypotheca* as well of moveables, as of immoveables; that is, there might be an hypothecation or pledge of personal property without possession or delivery of the thing; and this right travelled with the thing into whosever possession it might come. A pledge then in the Roman law answered exactly to a pledge of moveables in our law, where possession is indispensable. An hypothecation answered to a mortgage of real estate in our law, where the title to the thing may be acquired without possession. In the French law, however, from the inconvenience growing out of the transfers of personal property, subject to such prior titles by hypothecation, the doctrine has been constantly held, that moveables cannot be hypothecated, that is, transferred by way of pledge without possession; but that hypothecation is confined to immoveables. Hence the maxim, that moveables have no sequel by a mortgage.[2] When, therefore, we find the term hypothecation used in the French law, we are generally to understand it as used in this restrictive sense, though it is sometimes used in a broader and looser sense, as we sometimes call a mortgage a pledge, and a pledge a mortgage. Emérigon, in the passages cited at the bar, is to be understood as using hypothecation in its strict sense, unless where he qualifies it by some accompanying explanation.[3]

[1] Inst. Lib. 4, tit. 6, § 7. Dig. Lib. 20, tit. 1. l. 5, 1. See also 1 Bell, Comm. 25, 26.

[2] Domat, B. 3, tit. 1, § 1. 1 Valin, Lib. 1, tit. 14, art. 1.

[3] Emérigon, Contrats à la Grosse, ch. 12, § 1, 2, 3, 4, 5. 1 Bell, Comm. 25, 26, 39.

Now a lien by the maritime law is not strictly a Roman hypothecation, though it resembles it, and is often called a tacit hypothecation.[1] It also somewhat resembles what is called a *privilege* in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors.[2] Emérigon says, that this privilege was strictly personal, and gave only a preference against simple contract creditors, and had no effect against those, who were secured by express hypothecations; and that this personal privilege given by the Roman law is unknown in the French jurisprudence; for by the law of France every privilege carries with it a tacit and privileged hypothecation, at least as to the thing which is the subject of it.[3]

Lord *Tenterden* has remarked, that a contract of hypothecation made by the master does not transfer the property of the ship; but only gives the creditor a privilege or claim upon it, to be carried into effect by legal process.[4] And this is equally true, whether the hypothecation be express or tacit.

A maritime lien does not include, or require, any possession of the thing. It exists altogether independently of such possession. Nobody has supposed, that the lien on bottomry bonds, as for seamen's wages, is connected with any actual or constructive possession by the parties, seeking to enforce it *in rem*. This distinction between maritime liens, and strict possessory liens at the common law, goes very far to dispose

[1] 1 Domat, B. 3, tit. 1, § 5.

[2] 2 Browne, Civ. and Adm. Law, 142. Dig. Lib. 42, tit. 5. Abbott on Shipp., P. 2, ch. 3, § 10.

[3] Emérigon, Contrats à la Grosse, ch. 12, § 1, 2. See also 2 Browne, Civ. and Adm. Law, 142. See also Merlin, Répertorie, Privilége de Créance, § 1.

[4] Abbott on Shipp., P. 2, ch. 3, § 23. See also 1 Bell, Comm. 39, 94.

of the objection now under consideration. There is no inconsistency in giving credit for supplies, and at the same time retaining the lien on the ship for the value of those supplies. In fact, it would be utterly inconsistent with the professed object of all such supplies to retain the possession. That object is, to procure necessary repairs and supplies for the purpose of completing the voyage. But how is the voyage to be completed, if the material-man is to hold possession of the vessel, in order to secure his lien for the necessary repairs and supplies? The truth is, that the maritime law presupposes a credit given, a delay of payment, an intentional postponement of the right to enforce the claim *in rem*, at the same time that it creates the lien. How absurd would it be to declare, that the material-man should have a lien on the ship for his supplies, whenever in case of necessity, the master, not having funds, is compellable, in order to proceed on his voyage, to obtain such supplies; and yet at the same time to declare, that if the ship left the port without payment of his demand, the lien should be extinguished; when the very case supposed is, that the master has no immediate means of payment. How is he to pay without funds? And if he has funds, what use is there in the enhanced expense of a credit? If he has funds, he will pay at once, and have the work done, or supplies furnished at cash prices. It is only when his funds fail, that he will ask a credit for the owners upon the security of the ship. The effect of denying the lien in such cases would be, to compel the master to break up the voyage, or to resort to the extraordinary expedient of a bottomry bond upon onerous interest, to the serious injury of the owner. The maritime law in cases of material-men, as in other cases, where it gives a tacit hypothecation or lien, proceeds upon a different principle. It gives the lien upon the ship as an auxiliary to the personal security of the owner.

It does not require the lien to be enforced before the voyage is completed. It allows the party to give credit, because it is for the general benefit of navigation and trade. It is not necessary to say, that the lien is indelible; or that it may not be lost by gross neglect and delay to enforce it, at least where the rights of other persons have intervened. But, as in cases of seamen's wages and bottomry bonds, it requires only reasonable diligence in enforcing the claim at a proper time, and under proper circumstances. The Admiralty will not in cases of this sort sit for the purpose of enforcing stale claims, any more than in other cases, where its jurisdiction is sought. But, where the claim is recent, and the proceedings are had within a reasonable time, and in good faith; where there has been a clear case of necessity, and a credit given to the ship, the maritime law will not suffer the lien to be defeated by the mere departure of the ship from the port with or without the consent of the material-man. His giving credit to the ship for the voyage, or for a definite period, is not inconsistent with a positive intention to hold the ship bound for the payment by a tacit hypothecation or lien. It is not an election to rely exclusively upon the personal credit of the master or owner. His right, not growing out of possession, is not affected by the removal of the ship from the place, where possession may be enforced, or may be suspended.

A suggestion has been thrown out, that there is a difference between giving credit indefinitely, and for a time certain; for that in the latter case the remedy *in rem* is necessarily suspended during the fixed period of the credit. So is the remedy *in personam* during the same period. But this circumstance does not defeat the security *in rem*, any more than *in personam*, as soon as the credit has expired. There is no difficulty in supposing the existence of a lien for a debt *solvendum in futuro*. If a bottomry bond were payable in thirty

days after the safe arrival of the vessel, the additional period of credit would not defeat the hypothecation. If seamen's wages were by the contract not payable until ten days after the voyage was completed, it would not disturb the lien on the ship for those wages. The lien has in all such cases an inchoate existence from the moment of the contract, and attaches *sub modo* on the ship. The lien for seamen's wages attaches ordinarily on the ship during the voyage, although no wages are strictly due until the end of the voyage. A sale of the ship, pending the voyage, would not defeat this inchoate lien; and when the voyage was completed, the lien would have relation back to the commencement of the voyage.

There are analogous cases of liens even at the common law, where there is no possession, and where credit is given for a fixed period. Such is the lien of a vendor of real estate for the purchase money. Possession is not necessary to maintain that lien; neither does a long fixed credit annihilate, or suspend it. Yet the argument would apply at least as forcibly in such a case, as it does to the case now in judgment.

The case of *Ramsay* v. *Allegre* (12 Wheaton R. 611.) does not in the slightest degree impugn the foregoing reasoning. That case (in the judgment of which I concurred) was founded upon a very different principle. There, the materialman had received a negotiable promissory note, payable at four months, for the amount of his debt, as conditional payment. The note had not been paid; but it was still outstanding, and had never been surrendered; and it did not appear, that it had not in fact been negotiated. Under such circumstances the Supreme Court held, that a libel by the materialman could not be maintained. Now, there are two considerations proper to be noticed with reference to this case. The first is, that the taking of such a note is *primâ facie* a presump-

tive extinguishment *sub modo* of the debt; and if it had been actually negotiated, whether paid or not, the creditor could have had no right to recover his debt, as the debtor would still be responsible to the holder of the note; and he ought not to be twice liable for the same debt. The second is, that the receiving of such a note is direct proof, that credit is given to the personal responsibility of the owner, and presumptive proof, that no credit is given to the ship; or, in other words, that there is a waiver of any lien on the ship. It cannot be ordinarily presumed, that a ship-owner, giving a negotiable note for supplies, intends at the same time, that a lien shall exist on the ship itself for the debt; for then the lien might be in the hands of one person, and the negotiable security in the hands of another. To bring the present case within the reach of that decision, it should be shown, that a promissory negotiable note of the master or owner had been taken by the libellant. I have the most confident reasons to know, that the decision of the Court in *Ramsay* v. *Allegre* was not intended to shake any part of the doctrine in the case of *The General Smith.*

There is a case decided by Lord *Stowell,* upon a principle analogous to that in *Ramsay* v. *Allegre.* A seaman elected to take a bill of exchange on the ship-owners for the amount of his wages; and the bill being afterwards dishonored, and the owners having become bankrupts, he sought a remedy *in rem* against the ship, for his wages. But Lord *Stowell* dismissed the libel.[1]

Without going more at large into the argument, my judgment is, that the libel is well founded in point of jurisdiction; and that there has been no waiver of the lien implied by the maritime law for these supplies. Indeed, the moment the tes-

[1] The William Money, 2 Hagg. R. 136.

timony of the master is admitted, it is impossible to raise any presumption of a waiver from any of the circumstances; for he positively swears to facts, which establish, that credit was given to the ship, thus displacing, by an express understanding, all mere argumentative inferences. The decree of the District Court is, therefore, affirmed, with costs.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1831, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

BELL AND OTHERS *v.* CUNNINGHAM AND OTHERS.

A court of equity will grant an injunction *pro tanto* to so much of a judgment as has been recovered by surprise of the defendant at a trial, when he had a good defence to it, but had no notice of the claim, even though the plaintiffs in the suit were in no default, and acted *bonâ fide*.

Where foreigners are concerned, and have a good defence at law, unknown to their counsel, and the declaration is so amended at the trial as to let in a new claim, a court of equity will on due proof give them the benefit of such defence and grant an injunction *pro tanto* to the judgment at law.

THIS was a bill in equity for an injunction to a judgment at law in this Court between the same parties, and for other relief. The case is reported in 5 Mason's Reports, 161; and, having been carried by writ of error to the Supreme Court of the United States, will be found still more fully reported in 3 Peters' Reports, 69.

The facts now necessary to be stated to explain the grounds upon which this bill was brought, and upon which

the judgment of the Court in the present case was founded, were as follows: —

The defendants were owners of the brig Halcyon, and contemplating a voyage from Boston to Havana, and from thence to Leghorn, wrote a letter to the plaintiffs, the material parts of which are as follows: — "Boston, Sept. 15, 1824. Messrs. Bell, De Youngh, & Co. Gentlemen, This will be handed to you by Captain J. Skinner, master of the brig Halcyon belonging to us. We have contracted with Messrs. Atkinson & Rollins of this place to furnish 600 boxes [of sugar] from Havana to Leghorn on freight of £4. 10*s.* and five per cent. primage payable in a bill on London, &c., and 600 boxes on half profits, for freight, 1000 pezzos to be paid in Leghorn, on account of said profits. As the goods are to be consigned to you, we mention the terms of contract to avoid misunderstanding. The whole amount of freight receivable in Leghorn will be about 4600 pezzos. Please invest 2200 pezzos in marble tiles of 12, 14, and 16 oz., &c. The balance, after paying disbursements, please invest in wrapping-paper, to cost from 35 to 50 pezzos per 100 reams," &c. To this letter, which went by the Halcyon, there was a postscript added. "P. S. We have further engaged whatever may be necessary to fill the brig on half profits, on account of which 700 pezzos are to be paid in Leghorn. After purchasing the tiles, and paying the disbursements, you will invest the balance in paper, as before mentioned," &c. — The Halcyon sailed for Havana on the 16th of September. A duplicate of the above letter, without the postscript, was transmitted by the defendants to the plaintiffs, with a memorandum thereon of the 20th of September; and was received by them on the 30th of November, and answered on the 9th of December, agreeing to conform to the orders of the defendants. The postscript

does not appear to have been known to the plaintiffs until the arrival of the Halcyon at Leghorn, on the 13th of January, 1825, with 1330 boxes of sugar. The 700 pezzos alluded to in the postscript were to be advanced on a shipment made by one Charles Torrey. On the 17th of September, 1824, at Boston, he addressed a letter to the plaintiffs, in which he states, "Duplicate. I have also directed them [Messrs. Murdock, Storey, & Co.] to ship per brig Halcyon, Captain Skinner, on my account, 150 boxes brown sugar *on freight*, and moreover 150 boxes assorted sugars on *half profits*, or more if required to fill up, and not to exceed 200 boxes. These two adventures you will please keep distinct with a view to determine the profits on the assorted sugars, &c. You will please credit Messrs. Loring, Cunningham, & Co. [the defendants] 1700 pezzos, provided it shall appear to you probable, that one half of the net profits on the assorted sugars will amount to that sum. Should it appear likely, however, that the half profits will fall short of this amount, you will place to their credit that amount, which, in your opinion, will be equal to one half the net profits on the assorted sugars, &c. The Halcyon sailed yesterday for Havana, &c." This letter was received by the plaintiffs on the 17th of November, and subsequently answered.

The above letter of Charles Torrey was not introduced at the former trial.

William Sullivan, for the plaintiffs, claimed relief under the present bill on the following grounds: —

1. That he was surprised at the former trial by the claim upon the plaintiffs for the non-investment of the 700 pezzos, and was not therefore prepared to meet it.

2. That he was at that time entirely ignorant of the existence of any such orders as were contained in Torrey's letter; had he been acquainted with which, and introduced the

letter at the former trial, it would have defeated the defendants' claim for damages for the non-investment of the 700 pezzos.

The grounds taken by the plaintiffs' counsel being fully canvassed and confirmed by the opinion of the Court, his argument is omitted.

Charles G. Loring for the defendants.

The *first* point taken by the plaintiffs is, that they were surprised by the claim upon them for the non-investment of the 700 pezzos, at the trial, and were not therefore prepared to meet it.

This cannot be truly said. The original count was for the non-investment of 2200 pezzos in tiles; and, although the other parts of the contract were not set forth, they were known to the plaintiffs as well as to the defendants. The plaintiffs evidently had notice that the defendants claimed damages *to that extent*, and of course had notice to produce all the evidence in their power to show that they were unable to invest the 2200 pezzos, or were justified in omitting to do so. And it was under this count that all the evidence in the case was taken. The plaintiffs, then, knowing that the defendants claimed damages for the non-investment of the 2200 pezzos, must have known that these 700 pezzos were included in the estimate; for in the duplicate letter first received by them, which had not the postscript, they were informed that they would receive 4600 pezzos; and when the original letter with the postscript arrived, they received also the freight list, and at once saw that the 700 were necessary to make up the 4600. When, therefore, they were sued for the non-investment of 2200 pezzos for the whole amount originally ordered to be invested, they must have known that the defendants intended to claim damages for the non-investment of the 700 pezzos, thus expressly direct-

ed by them, when the orders were given, to constitute a portion of the 4600, out of which these 2200 were to be taken. But this notice is put beyond all question by the letter of the defendants, under date of the 18th of April, 1825, in which they expressly allege the non-investment of these 700 pezzos, as one ground of complaint.

It is clear, therefore, that here was no such *surprise* as would have entitled the plaintiffs to a new trial on motion; they had full knowledge of the claim and *personal possession of the evidence.* If they could have claimed any right, it could have been only that of a continuance on the ground of surprise: — they went on in the trial, and this is an afterthought of which they would now avail themselves.

A court of equity will not relieve where a defence might have been made at law, unless the party was prevented from making it by fraud, or pure accident unmixed with any fault or negligence of himself or his agents. *Marine Ins. Co.* v. *Hodson*, 7 Cranch, 336; *Ware* v. *Harwood*, 14 Ves. 30; *Bateman* v. *Willoe*, Sch. & Lef. 201; 6 Johns. Ch. Cas. 235; Eden. 10; Grant on N. T. 113, and onward.

There can be no pretence of fraud on the part of the defendants; none is alleged.

Nor can there be any of concealment; for it is proved by the plaintiffs' own witnesses, that the defendants inquired for and sought to obtain the letters and bills of lading before they did. If there was any concealment, it was on the part of the plaintiffs, who had possession of the letter all the time.

There being then no surprise, no fraud, and no concealment, on what ground can relief be granted?

Nor can this be called newly discovered evidence, for it was in the plaintiffs' own knowledge and possession.

The *second* ground upon which relief is claimed is, that the facts now proved, if proved at the trial, would have defeated the defendants' claim for damages for the non-investment of the 700 pezzos.

We contend, on the contrary, that the facts now proved, so far from invalidating the verdict in this particular, prove conclusively its justness. The inquiry is not what effect the production of Torrey's letter *might* have had upon the jury, the defendants having then no means of refuting it, but whether, upon the case now made out to the Court, the plaintiffs are entitled to relief.

Now, upon the evidence, it is clear that the contract between Torrey and the defendants was, that the 700 pezzos should be advanced in Leghorn. The bill charges the contrary, but the answer meets and denies the charge in unqualified terms.

The only witness in support of the bill is Torrey; but he testifies with caution as to what was his understanding of the contract. The defendants swear absolutely and unequivocally.

Torrey's testimony is corroborated by his letter; but the defendants' answer is equally so by their letter to the plaintiffs and their instructions to the master, which are full and explicit to this point.

All the collateral circumstances tend to show the truth of the answer, and that Torrey is in error;—the object of the voyage, predicated wholly on the freight to be received at Leghorn; the investment in tiles ordered to be made *before the ship's arrival*, to be paid for out of her freight; the ordering by the defendants of an investment of 4600 pezzos before the contract was made with Torrey about these 700, which were necessary to make up their funds. The contract was reasonable on the part of Torrey,

as he would not have made a shipment unless confident that his sugars would at least yield a common freight, and necessary on the part of the defendants to enable them to fulfil their engagements with the plaintiffs.

It is clear that the contract made between Torrey's agents at Havana, the place of shipment, and the master of the defendants' vessel, was the same. The shipment was actually made on these terms. The bill of lading refers to an agreement; that agreement was specifically set forth in the captain's orders, and must have been that referred to in the bill of lading; there is no pretence that any other was known or thought of by Torrey's agents or the master.

The freight list confirms this view. Whatever, then, might have been the contract here, the shipment was made on these terms; and we contend strenuously, *that the actual terms of the shipment must determine the rights of the parties.* And from these positions the duty of the plaintiffs is plainly inferrible.

They were the consignees of the defendants' ship, and of Torrey's sugars; and had different instructions from each party plainly inconsistent. And if they could not conform to either, without risk of responsibility to the other, they could have avoided it effectually by refusing the consignment of the one and conforming to the orders of the other; and, whichever they thus accepted, the rights of the defendants would have been preserved. Thus, if they had refused the consignment of the sugars, as consignees of the vessel, they would have retained through the master their lien on them until the 700 pezzos should be advanced by any other consignee whom the master should have appointed; and if they had refused the consignment of the vessel, the master and the other consignee of her would not have delivered the sugars until such payment.

If, on the other hand, they chose to take upon themselves the responsibility of deciding, they did so at their peril, and must take the consequences; and, as it now appears that they decided against the lawful right, they must indemnify the party injured.

This view, which presupposes an equality in the contracts made between the plaintiffs and Torrey, and the defendants, is the strongest that can be taken for the plaintiffs; but they do not stand on so strong ground; the contract between them and the defendants was prior in time, and therefore of superior obligation, and they could not voluntarily enter into one with Torrey inconsistent with it; they had formerly agreed to accept the consignment of the vessel, with orders to receive the 700 pezzos out of their sugars, and could not be relieved from it by him.

If, then, the contract between Torrey and the defendants was as we allege, it is clear that the plaintiffs were justly liable to them according to the verdict.

But, if it were now doubtful what that contract was, the result would have been the same; for the bill of lading determined it as to the plaintiffs, and they were bound to conform to it; it referred to the agreement between Torrey and the defendants, and that agreement was set forth in the master's instructions, which they doubtless saw, or at least were bound to see, if they had any doubts, as they must have had when receiving different directions from Torrey and the defendants. This was the legal documentary evidence of the terms upon which the shipment was actually made; and could for ever protect the plaintiffs from all liability to Torrey, had they conformed to them. If the bill of lading had expressed that the sugars were deliverable on payment of 700 pezzos, could the plaintiffs have justified themselves in not requiring payment because the letter of

instructions from Torrey contained different orders? Surely not. And the bill of lading referring to the agreement is equally conclusive and obligatory.

Again. Admitting for the sake of the argument, that no binding contract was actually made, here or at Havana, between Torrey and the defendants, still the plaintiffs were bound to obey the orders of the defendants, and not of Torrey, and for this obvious reason. The defendants, as owners of the ship, had the power of enforcing the contract according to their construction of it, by retaining the sugars until the 700 pezzos were paid; nor would it have been possible for Torrey, or his agents, to have obtained them otherwise; and the plaintiffs had no right to waive that advantage. They ought to have refused the consignment of the ship, or of the sugars, and thus have left the parties to their legal remedies. *They had no right, by accepting both, to change the respective situations of their constituents, and to take from the defendants this power of enforcing the contract according to their construction, and transfer this power to Torrey to enforce it according to his. And, if they accepted both consignments, they were bound to do so without thus changing the remedial relations of the parties.*

In such cases, if the true contract be not clearly ascertainable, *potior est conditio possidentis*; and any agent, who should destroy that condition, and yield the advantage, should be made answerable to his employer.

The hardship of a contrary construction in this case is most manifest, as the defendants will thereby not only lose their remedy against the plaintiffs, but can have none against Torrey, as they can have no evidence by which to prove the contract as stated by them; the means of proving it in this case not being available to them in a suit upon it against

him; so that, by the misconduct of the paintiffs, the defendants sustain a great loss without any remedy.

Story J. The case in equity is substantially narrowed down to the consideration, whether the former judgment, so far as regards the non-investment of the 700 pezzos stated in the case, is correct upon the new facts now alleged; and, if not, whether the defendants are entitled, upon the principles of a court of equity, to any relief. If either ground is against the plaintiffs, their bill fails; they can succeed only by establishing both grounds in their favor. There does not appear to have been a written agreement between Mr. Torrey and Messrs. Cunningham, Loring, & Co., in respect to this shipment. Nor does it appear, that the plaintiffs had any other means of knowledge what it was, except from the language of this letter, and from the postcript to the letter of the plaintiffs of the 1st of September. That the parties should in a matter resting wholly in parol, differ in respect to what were the terms of the shipment, the shipper supposing, that the advance of the 700 pezzos was to be conditional, and the owners of the Halcyon, that it was to be absolute, and at all events, is not surprising; for differences of this sort are of daily occurrence. But that in so important a contract no written paper should have been executed, and no joint instructions sent to the consignees, is truly matter of surprise, since it was the only effectual means of obviating possible difficulties. Indeed, there is no evidence, that Mr. Torrey ever saw the postscript to the letter of the defendants to the plaintiffs, and the defendants positively deny, that they ever saw the letter of Torrey to the plaintiffs. If I were called upon to decide upon the whole transactions, whether the views taken of the contract of shipment by the defendants, or by Torrey, was a correct exposition of it, I confess, that the strong inclination of my mind would be, that the

defendants truly expounded it. Still it is quite possible, that there might have been a very honest misconception of it by both parties, from the imperfect explanations given, and from the strong belief, in the then state of the market, on the part of the defendants, that the half profits must in every event exceed the 700 pezzos.

Now the recovery against the plaintiffs having been for damages for the non-investment of the 700 pezzos, as well as the other funds, contrary to orders, it becomes important to consider, whether if these facts and the others now in the case had been before the Court at the trial, the Court would have authorized by its opinion the recovery of such damages. It is agreed on all sides, that there were no profits on the sugars, which would have justified the advance of the 700 pezzos. And the question turns upon this, whether the plaintiffs were, under the circumstances, bound to make it, and to invest the same accordingly.

It is very certain, that the plaintiffs have not disobeyed the instructions given them by Mr. Torrey. They have acted in exact conformity to them. If the present judgment stands good against the plaintiffs, they have no remedy over for the same against Torrey. In what manner could they shape a claim against Torrey. They did not make any advance on his account. He did not authorize them to make any, except conditionally. And, whether in respect to Messrs. Cunningham, Loring, & Co. his orders conformed or not with his contract, was nothing to the plaintiffs. They had no right to bind him to a fulfilment of it. And if a recovery is now justifiable against the plaintiffs, it is because they have entered into a contract with the defendants to make an advance and investment under circumstances not authorized by Torrey's orders. Now this is very material to be considered; for the loss, whatever it is, must be borne exclusively

by the plaintiffs. On the other hand, if the defendants are not entitled to retain the damages for the 700 pezzos, against the plaintiffs, still, if Torrey has broken his contract with the defendants, by not permitting the advance to be made, they have a perfect remedy over against him.

First, it is said, that the bill of lading accompanying the consignment of Torrey's shipment states, that freight is to be paid "as per agreement." But what agreement? The defendants say, that the agreement must be that, which they state in the postscript of their letter of the 15th of September, and in the master's instructions for the voyage. But there is no proof, that these instructions were ever seen by the plaintiffs. The postscript was seen by them. But as there is no reference to any particular agreement, and no written agreement was produced under the hands of the parties, there is no ground to say, that the agreement, under which the plaintiffs were to act, was any more that stated in the postscript, than that stated in their own orders from Torrey. Nor are the terms of the agreement so differently set forth by the postscript and the orders as to be wholly irreconcilable with each other. The 700 pezzos were to be advanced at Leghorn. But the advance, though stated in general terms in the postscript, might still be fairly understood by the plaintiffs as conditional and discretionary, as stated in the orders. And it was their duty to act in a manner, if possible, reconcilable with both. If the parties have, by their neglect to sign joint orders, placed the plaintiffs in a situation to act, and yet they may mistake what is their duty, ought a court of equity to hold them responsible, as if they had been themselves guilty of gross laches and wilful disobedience of orders?

But it is next said, that, if the orders were incompatible, the plaintiffs should have rejected all the consignments both of ship and cargo, and thus have protected

themselves from responsibility. I exceedingly doubt, whether, under the circumstances, they would have been justified in so doing; and if the defendants had sustained any injury from their refusal, it would have been difficult to have exonerated themselves from the payment of damages. Because they could not carry into effect all the contracts of all the parties, they were not bound to reject all. And if they were at liberty to accept the consignments of Messrs. Atkinson & Rollins, and others, there is no ground to say, that they were bound to reject the consignment of Torrey. The argument for rejection goes, as it seems to me, to the whole consignments, if to any. But if they might have rejected all, or a part, still the inquiry is, whether they were bound so to do? I think they were not. They had a right to receive the other consignments, and also that of the vessel, in order to reimburse themselves, for their purchases already made, and to be made, of tiles and paper. And if they had refused the consignments, there is no pretence to say, that they were bound to supply the tiles and paper. The rejection would have been owing to a neglect on the part of the defendants, or of the shippers, and not of the plaintiffs.

But I do not accede to the doctrine advanced at the bar, that, where there is a consignment of ship and cargo, belonging to different persons, and the ship-owner construes his contract one way, and the shippers another way, the consignees are bound at their own peril to settle on the spot the rights of the parties. My opinion is, that the consignees are bound to obey the orders of the consignor, and not of the ship-owner, if there be any discrepancy between them. It is true, that the ship-owners are not bound to deliver the goods unless the consignees agree to pay freight, &c., according to the contract between them and the shippers. And they may insist upon an absolute agreement to this effect on the

part of the consignees, before the delivery, if there be any dispute, as to what the contract is; and the consignees will be then bound by their own agreement. But where no such dispute is known or understood at the time of the delivery, and it passes *sub silentio*, then the consignees cannot protect themselves in disobeying the orders of the consignors. They are bound to pursue them; and if any injury arises to the other side, the remedy lies against the consignors, and not against the consignees. In the present case there is no evidence to show, that the master of the Halcyon demanded back Torrey's sugars, or that he expressed dissatisfaction with the conduct of the consignees under the circumstances. It is true, that the defendants, in their letter of the 18th of April, 1825, do complain to the plaintiffs of their breach of orders in not investing the 700 pezzos, as well as the other funds. But the plaintiffs in a reply of the 27th of June, 1825, state the reason. "The sum of 700 pezzos, which were to be advanced here on account of half profits of the Halcyon cargo of sugar, not having been due, from a default of profits, we considered ourselves authorized to act with a discretionary power, otherwise be assured, that we never deviate from orders." No reply was ever made by the defendants to this letter. And this to some extent at least furnishes a presumption in favor of their acquiescence in the fairness of the plaintiffs' conduct, though its legal correctness may not have been admitted.

There is another consideration not wholly immaterial. As the postscript was not communicated to the plaintiffs until the arrival of the brig, they had no means of knowing, or even of conjecturing, that there would be any discrepancy between the contract, as understood by Torrey and by the defendants. It was too late then to consult either party; for the delay would have been equivalent to a loss of the voyage. The plaintiffs then were compellable to act in a new emergency; and their conduct, if *bonâ fide*, is certainly

entitled to great indulgence. It does not appear that Messrs. Murdock, Storey, & Co., the shipper's agents at Havana, made any communication to the plaintiffs on the subject; so that they were left wholly to thread their way by the light of the orders of Torrey and the postscript. The ground of recovery for the non-investment of the 700 pezzos certainly was, that there was no proof, that the advance was not absolutely ordered by the consignor of the shipment. If it had appeared otherwise, I am free to say, that I should have given a different direction to the jury on this point.

It seems to me, that where an agent receives orders from the consignor giving one interpretation to the contract, and from the ship-owner giving a different interpretation, he is not required to reject the consignment; but he may receive it and act for the benefit of both parties, and remit the question, for them to decide it for themselves. I do not think he is bound to involve himself in a law-suit by a breach of the orders of the consigneee.

In the present case, if it stood before the jury, as it now does, I should be of opinion, that, however equitable might be the claim for damages by the defendants against Torrey, that claim ought not to be sustained against agents, who have acted *bonâ fide*, and without any wilful act done in breach of their duty.

The remaining question is, whether, the recovery having been had perfectly justifiably by the defendants upon their own view of the case, the plaintiffs have now any right to relief against the full effect of that judgment. I agree entirely to the doctrine, that, if the defendants have had full knowledge and means of making a complete defence, and have omitted so to do, that furnishes no ground for a new trial at law or in equity. This, however, is not the case of an application for a new trial, either at law or in equity. It is an application for an injunction *pro tanto* to the judgment

for what is not conscientiously due from the plaintiffs, however conscientiously the defendants might deem themselves entitled to retain it. The language of the Court in the case of *The Marine Insurance Company of Alexandria* v. *Hodgson*, (7 Cranch 332, 2 Peters' Cond. R. 516,) seems to me to contain so cogent and clear an exposition of the true principles, which ought to govern a court of equity on this subject, that it is useless to go farther into the authorities upon the general doctrine.

The ground of the present bill is, that the plaintiffs were taken by surprise at the trial, and had no opportunity to avail themselves of the defence, which they now set up; that they have been guilty of no negligence; and that they have lost their cause from sheer mistake and ignorance of the nature and extent of the claim against them.

The first question is, whether the plaintiffs had any notice of the claim on account of the non-investment of the 700 pezzos. No notice *in pais*, that it was contemplated in the suit, is established. But the defendants insist, that they always did contemplate it as a part of their demand, and that it is covered by the counts in their declaration, and therefore constructively brought home to the knowledge of the plaintiffs. The suit was originally brought in the state court in 1827, and was removed into the Circuit Court, and came on for trial at October Term, 1828. The original declaration contained, besides the money counts, only one special count, and that was in the most general form alleging that Bell, De Youngh, & Co. had undertaken out of certain funds of Messrs. Cunningham, Loring, & Co., to purchase for them at Leghorn upon commission, 2200 pezzos in value of marble tiles of certain specified dimensions, and had broken their contract. Upon the trial it appearing to the Court, that the special agreement produced in evidence was not sufficiently set forth, the then plaintiffs obtained leave to amend, and

filed three new counts, upon which a trial was had at the same term. The first new count is in substance founded on the original letter of the 15th of September, 1824, and recites it, without any allusion whatever to the postscript, and avers the freight-money recovered to have been, (under a *videlicet*,) 3449 pezzos, and a neglect to make the investment. The second new count states the voyage to Havana, the leaving of goods there to be carried from thence to Leghorn, *on freight* for certain moneys to *be paid by the owners thereof to the then plaintiffs*, and their intention to invest at Leghorn 2200 pezzos of such moneys, so to be received, in marble tiles, &c., the residue of such moneys, after deducting disbursements, in wrapping-paper, and a promise of the then defendants out of such moneys to make the purchases accordingly. It then avers, that a large sum became due, payable at Leghorn to the then plaintiffs, *for the freight of the said goods*, to wit, 3439 pezzos, which was received by the then defendants, and alleges a breach in the non-investment. The third new count alleges the contract to be, that heretofore, to wit, on the 9th of December, 1824, the then defendants had in their hands a large sum of money, to wit $5000, the property of the then plaintiffs; and the then defendants undertook to purchase for the then plaintiffs 2200 pezzos in value of marble tiles, &c., and to invest the residue thereof, after deducting disbursements, in wrapping-paper, &c., &c.; and then proceeds to state a breach by non-investment, by which the then plaintiffs had sustained damages to the amount of $7000.

The original declaration certainly contained no count adapted to make out a case under the postscript. And it does not appear to me, that the first or second new counts, in the manner in which they are actually framed, can cover any claim for the non-investment of the 700 pezzos. They seem to me exclusively adapted to meet the case of the non-

investment of the funds under the original letter, independent of the postscript. The only count, which seems entitled to cover the 700 pezzos, is the third new count; and unless my recollection misleads me, this was the count, on which the right to recover was, at the trial, mainly, if not exclusively rested. Now, it cannot escape observation, that this count is very general in form, and conveys not the slightest information as to any particulars of the funds. The *gravamen*, which it principally purports to insist upon, is the non-investment of the 2200 pezzos in marble tiles, and the statement of the funds is under a *videlicet*, and merely introductory. Had, then, the plaintiffs any reason to suppose, that they constituted a part of the claim of Messrs. Cunningham, Loring, & Co. against them? I do not ask, whether the latter contemplated it as a part of their claim; for that may be admitted, and yet the posture of the case be not changed. I am of opinion, that there is no evidence in the case, that could reasonably lead the plaintiffs to such a conclusion. It is true, that Messrs. Cunningham, Loring, & Co. did, in their letter of the 18th of April, 1825, complain to the plaintiffs of the non-investment of the 700 pezzos, as a grievance. But the plaintiffs in their reply of the 27th of June, 1825, already alluded to, stated, that the advance of the 700 pezzos was to be conditional and discretionary, in case there were half profits. The omission on the part of Messrs. Cunningham, Loring, & Co. to reply to that statement, would naturally lead the plaintiffs to presume, that so far at least they acquiesced in the justification set up by them. And the original declaration gave no notice of any different intention. And there is no pretence to say, that, by any other matters *in pais*, the plaintiffs had any special notice of this claim being insisted on.

Now, even supposing the new counts gave the most perfect notice of the claim at the trial, it is most manifest, that

the plaintiffs could not be apprized of it; for they were in a foreign country, and utterly without any conusance of the proceedings at the trial. The new counts were filed after the trial commenced, and a delay of a short period only was allowed before the trial was again resumed. I have no right to refer to my own recollection of the occurrences at the trial. But it has been stated at the bar, and admitted to be correct, that although Messrs. Cunningham, Loring, & Co. insisted, that they had always intended to make this claim, the counsel for Messrs. Bell, De Youngh, & Co. expressed an utter surprise at the information, and asserted his prior ignorance of any such claim. And it is not now denied, that such was the fact on his part. And it is not controverted, that, at that time, he had not the slightest knowledge of the orders of Mr. Torrey, so as to enable him to avail himself of that defence.

What, then, is the case before the Court? Foreigners are sued in an action, which gives them no notice of the particular claim. Their counsel, the foreigners being resident abroad, go to trial upon the declaration, as it stands, and that declaration is not supportable. New counts are filed, by leave of the Court, which cover a claim not before embraced in the actual frame of the declaration. The foreigners have no notice of it, and of course no means of instructing their counsel on any point of defence. The trial immediately proceeds, and a verdict is obtained, which upon facts, which could have been supplied upon due notice by the foreigners, would not have been recovered according to the principles of law. Upon such a case, where the recovery must be, if maintained, a final loss to the parties; where they can receive no ulterior remedy; where they acted merely as agents, *bonâ fide*, and according to the orders of their principal; can there be a doubt, that a court of equity ought to furnish redress?

It is a case of substantive, unqualified surprise. Even courts of law do not hesitate to grant new trials in cases of surprise. It is a case of persons abroad, who are necessarily compelled to rely on counsel at a distance, and without the means of immediate communication with them. And in such cases, courts of law look with more indulgence in granting new trials, even where the attorney may not be presumed to be wholly without negligence, and more diligence might have brought the proper defence to his knowledge, the papers being in his possession.[1]

Looking, then, to the case, as it is now presented to the Court, I feel, that I am doing no more than what every court of equity would, under like circumstances, feel itself bound to do; to grant relief, and a perpetual injunction as to so much of the judgment, as is covered by the damages given on account of the non-investment of the 700 pezzos. This is readily ascertained by mere computation, and applying the rule of proportion.

I make this decree without the slightest intention of suggesting, that the defendants have insisted upon a hard and unconscionable verdict, or have been wanting in all due equity. They have sustained great losses by the misconduct of the plaintiffs in not complying with their orders; and might fairly enough claim to retain any sum, which was not beyond those losses. And, inasmuch as they have been in no default, I do not see, that they ought to be deprived of their costs in this suit.

[1] *Broadhead* v. *Marshall*, 2 Wm. Black. R. 955; Grant on New Trials, 132. Id. 115.

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM, 1831, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

EDWARD DEXTER, JR. AND OTHERS

vs.

ANNA ARNOLD, ADMINISTRATRIX, AND OTHERS.

The circumstances under which a mortgage is redeemable.

Twenty years' undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage during that period, is a bar to a bill to redeem. But if within that period, there be any account or solemn acknowledgment of the mortgage, as subsisting, it is otherwise.

An acknowledgment by the mortgagee in his answer to a bill in equity between other parties, that it remains a mortgage, is a sufficient acknowledgment to allow a redemption.

To a bill to redeem, the heirs of the mortgagee, as well as his personal representative, are ordinarily necessary parties.

Quære, in what cases they may be dispensed with.

If the mortgagee has never taken possession during his lifetime, the mortgage belongs in Rhode Island to his personal representative, and the heirs need not be made parties to a bill to redeem.

Cestuique trust under mortgager cannot ordinarily redeem. The trustees must be made parties, and a reason shown, why they are not plaintiffs.

If a mortgage be of different parcels of land, some of which have been sold by the mortgagee absolutely, and others remain in his possession; and the right to redeem, as to the purchasers, is gone by lapse of time, this does not bar the remedy against the mortgager, if otherwise well founded.

Acknowledgments of the mortgagee after sale do not affect or bind the purchasers, who are such *bonâ fide* and without actual notice of the mortgage.

Quære, if a bill in equity can be maintained to redeem, where part only of the heirs of the mortgagee are before the Court.

THIS was a bill in equity, brought by the plaintiffs, at the June Term of this Court in 1828, to redeem a mortgage given many years ago, and it sought an account and other relief, according to the common course in bills of this nature. The mortgage was made by one Jonathan Arnold, (who was then the owner in fee,) on the 13th of February, 1800, to one Thomas Arnold, in fee conditioned for the payment of sixteen hundred dollars and interest on or before the 20th day of January, 1801. The mortgage embraced one part of a lot, and the stores thereon, situate on the west side of the Main Street in Providence; and of one third (in fact he was owner of but one sixth) part of three other lots, at Fox's Point in said Providence. Jonathan Arnold, the mortgager, died in October, 1806, without issue, being at that time insolvent, and leaving several persons his heirs, and among others Marcy Dexter, under whom the defendants claim, in the manner which will be hereafter stated. Administration upon his estate was taken by Thomas Arnold, the mortgagee, who entered into possession of the premises immediately on, or soon after, the execution of the mortgage, and continued in possession thereof until he sold the Fox Point lots in December, 1810; and the grantees and those claiming under them have ever since been in possession under that sale. Of the remainder of the mortgaged premises, viz. the Main Street lot, the mortgagee continued in possession until his death, in October, 1826. At his death he left, as his heirs, Thomas Arnold, who soon afterwards took administration upon his estate, and as such is made defendant in the cause, and James Arnold, (a citizen of Massachusetts,) who is not

made a party to the bill, because the will alleges him to be resident out of the jurisdiction of the Court.

Marcy Dexter died on the 4th of September, 1817, and by her last will and testament devised as follows: "All the remainder of my estate or property of every kind and nature, (which included her interest in the mortgaged premises,) I give to my sons, Stephen Dexter and Edward Dexter, in trust for the use, maintenance, and support of my daughter, Susannah Dexter, in a comfortable manner during her natural life; and if there shall be any of my property remaining after supporting my daughter, Susannah Dexter, as aforesaid, my will is, and I do hereby give and order the same to be paid, one half to the children of the said Stephen, and the other half to the children of the said Edward, that may be then living, by my trustees aforesaid, share and share alike." And in the same will the testatrix nominated the said Stephen and Edward her executors, who accepted the trust, and were qualified according to law.

In September, 1820, Susannah Dexter died intestate and without issue. The plaintiffs are the children of the trustees and are designated as the ultimate *cestuisque trust* under the will.

The case was argued by *J. L. Tillinghast* for the plaintiffs, and by *R. W. Greene*, District Attorney, for the defendants.

Story J. This case has been very elaborately argued at the bar; but the view, which is taken of it by the Court, does not require all the points and arguments to be brought into the reasoning, on which the decision is founded.

It appears to us very clear, that the trustees under the will were invested with the legal estate, and consequently they are the proper parties to file a bill to redeem.[1] It does not

[1] See Powell on Mortg. by Coventry, with Rand's Notes, 1 Vol. 331, 332. *Grant* v. *Duane*, 9 John. R. 591.

appear from the bill, that the plaintiffs are really entitled to any thing under the will; for it is not alleged that any thing would or did remain after satisfying the prior trust in favor of Susannah Dexter. If it did, still the trustees being owners of the legal estate, are solely entitled to redeem, unless they have refused to redeem, or have colluded with the mortgagee, or some other impediment is shown to the redemption on their part. The bill ought to have contained specific allegations on this head, stating a case, which would establish a residuary interest in the plaintiffs, and a ground for their claim to redeem, instead of the trustees. No such allegations are found in the bill; and on this account it is in its present shape fatally defective. It is true, that the trustees are made parties to the bill, and have answered, and there is a general charge of confederacy against them. But this will not supply the defect of proper allegations to establish the plaintiffs' claim to redeem. The trustees must be called upon to answer, and must answer specifically to such matters, as will justify the Court in acting without or adversely to them. This, however, is a defect, which the Court are not precluded from allowing the plaintiffs to supply, in order to prevent a failure of justice, if the plaintiffs have any merits.

All the other heirs of Jonathan Arnold, the mortgager, or their representatives, are before the Court, as defendants to the bill, with the exception of one Benjamin Arnold, a citizen of New York, who is alleged to be out of the jurisdiction of the Court. But there is no allegation in the bill, that he is unwilling or unable to assist in the redemption. Now, in general, it is certainly proper, that all the persons, who are heirs of the mortgager, should be before the Court before a redemption of the estate is decreed. And this for two reasons; first, that their rights and interests may not be affected

by any change of the title without their consent; and secondly, that they may be parties to the account, and the mortgagee or his heirs and representatives not be harassed by a new suit for a new account. We do not know, that, where an heir is beyond the jurisdiction of the Court, the difficulty is absolutely insuperable. But if it is not, still the Court is bound in its decree to take care of his interests, as far as it may, and to give him by notice an opportunity, if practicable, of coming in before the master, and litigating for his interests in the taking of the account and the decree of redemption.

Another difficulty has suggested itself to our minds; and that is, whether the Court can proceed to a decree of redemption, without having all the heirs of the mortgagee, as well as his personal representatives, before the Court. The bill itself shows, that James Arnold, one of the heirs of the mortgagee, is not before the Court, and he is stated to be out of the jurisdiction. No one can doubt the propriety of having all the heirs of the mortgagee before the Court, if they can be made parties.[1] The only question is, whether they are not indispensable parties. In England, the heirs must be before the court, in order to reconvey the estate to the mortgager; for it descends to them, though generally in trust for the personal representative of the mortgagee. There may be peculiar cases, in which, where one of the heirs is beyond the jurisdiction, or cannot by any diligence be found, the court will act without him.[2] But in these cases the relief granted must be necessarily imperfect, as it cannot bind persons not before the court. In the case at bar, if there had been no entry or possession by the mortgagee, in

[1] See Powell on Mortg., by Coventry, with Rand's Notes, Vol. I. 968, 970; and note N. Cooper, Eq. Plead. 37.

[2] Powell on Mortg., by Coventry, Vol. I. p. 403, note N.

his lifetime, in the premises, there would not have been any substantial difficulty in proceeding against the personal representative of the mortgagee, who is before the Court. The statute of Rhode Island has declared, that in all cases debts due by mortgage shall be considered as personal property, and distributed as such. And where the mortgagee has deceased without taking possession of the mortgaged estate, the debt is deemed personal assets, and the mortgage under the same control of the executor and administrator as if it had been a pledge of personal estate; and the executor and administrator may bring an ejectment to recover possession, in which action it is made sufficient to declare on the seisin of possession of the mortgage. And the executor and administrator are authorized to discharge the mortgage on payment, by release, quitclaim, or other legal conveyance.[1] So that, in such cases, the presence of the heir seems wholly unnecessary, and may therefore be dispensed with. But the difficulty in the case at bar is, that the mortgagee had taken possession during his lifetime, (in what manner we shall hereafter consider,) and continued that possession for about twenty-six years. And the question, therefore, whether it is to be treated as a subsisting mortgage, or as an absolute estate, is most material to all the heirs of the mortgagee, and upon which they are entitled to be heard. The difference between the case of a possession, and of a want of possession by the mortgagee, has been treated by the Supreme Court of Massachusetts, under a local statute, very similar to that of Rhode Island, as most material; for, where there has been such possession, the estate is held to pass by descent to the heirs; where there has been none, it goes directly to the executor

[1] Statutes of Rhode Island, Digest of 1798, p. 303. Digest of 1822, pp. 233, 234.

and administrator.[1] Without, however, considering this objection as insuperable, and reserving it, as it has not been argued, for further consideration, as one of the heirs, against whom relief may be had *pro tanto* is before the Court, we shall proceed to the main question in the cause.

And, in the first place, are the plaintiffs, supposing all other difficulties overcome, entitled to relief against the defendants, who are claimants and proprietors of the Fox Point lots? We are clearly of opinion, that they are not. They are *bonâ fide* purchasers for a valuable consideration without any actual notice of the mortgage, and affected by it only so far, as it varies constructively from the registry of the mortgage. The application is made after they have been in uninterrupted possession of the premises for eighteen years under their purchase, and have made valuable improvements thereon. We make no distinction between their possession of the upland, and the flats. The latter were a part of their grant, and, whether visibly occupied or not, follow the seisin of the other part, there being no pretence of any adverse possession. In addition to this, the mortgagee, when he sold to them, had been in visible possession of the estate for ten years. The mortgage had been forfeited by breach of the condition for nine years. The mortgager had been dead four years; his estate was utterly and hopelessly insolvent at the time, and became solvent only by the ultimate settlement of the Yazoo claims by Congress in 1814. The estate was administered upon by the mortgagee; and all the circumstances must have been well known to him, and to the heirs. At least, the heirs had far better means of knowledge than the purchasers, and must be presumed to have had constructive notice of their rights. Under such circumstances, the equity of redemption must, in

[1] See *Smith* v. *Dyer*, 16 Mass. R. 18.

respect to these purchasers, have been deemed of no value, and to have been abandoned by all parties. The heirs had no interest to redeem, for the estate was insolvent; the creditors made no effort to redeem; and the property lay in the hands of the mortgagee, as a pledge not worth redemption. If afterwards, after the estate became solvent, the heirs had then pressed forward their claim against the purchasers, there might have been some foundation for relief. But they lay by through a period of fourteen years more without any stir, and until the mortgagee was himself dead. Now, there is nothing in the case to break the force of these circumstances in respect to these purchasers. It is said, that in another suit in equity, in 1822, the mortgagee acknowledged, that he held the estate in mortgage, and that it was not irredeemable. But how can this affect these purchasers? They are not affected, much less bound by any admissions made by the mortgagee after the sale to them, whatever they may be. Their rights are not to be affected by his confessions. He sold to them, as absolute owner; and they are entitled to be secure against any subsequent admissions, which should control that solemn declaration under his own seal.

But, it is said, that though the mortgagee took possession of the mortgaged estate, it was as agent of the mortgager. This is the allegation in the amended bill. In the original bill the possession is stated without any such qualification. Now, this qualification of the possession is utterly denied by the answers, and of course must be proved in order to control those answers. No such proof exists in the case; and it seems to us, that it is in its nature almost incapable of proof. A mortgagee entering into possession, and taking the profits, must be deemed to take them in his character as mortgagee. If in any sense he can be said to take them as agent, it must be as agent-mortgagee. Before forfeiture he may properly

be deemed, in some sort, an agent. But after forfeiture his possession is under his title; and if he then takes the profits, he must be deemed to take them as mortgagee, and not otherwise, unless there be the most plenary and irresistible proof, that he has disclaimed that character, and taken them to account, and has accounted therefor, as a stranger-agent. No such account is pretended in the present case. All the circumstances are against it. There has been no account whatever rendered, at any time, on the footing of the mortgage. When the mortgager died, in 1806, the agency must at all events have terminated; and the possession after that time, was about twenty years without any account. There cannot be any reasonable doubt, that the utter insolvency of the estate at that period made it no object with the heirs to treat it as mere security; and the creditors, from ignorance, or laches, or indifference, slumbered over their rights. It appears to us, that under all the circumstances there would, after such a lapse of time, be gross injustice in allowing a redemption against these purchasers. Our judgment accordingly is, that the bill, as against them, ought to be dismissed, but without costs.

But, in respect to the Main Street estate, which remained in the mortgagee's possession up to the time of his death, very different considerations may well enter into the question of redemption. Generally speaking, no lapse of time will bar the right to redeem, so long as the mortgage has been treated between the parties as a subsisting mortgage and security only. But, if the mortgagee has been in possession of the mortgaged premises for twenty years, taking the profits without any account or act done, by which he admits himself to hold it as a qualified estate, the equity of redemption will be presumed to be extinguished, or abandoned by the mortgagee; and a bill to redeem will not be entertained by a

court of equity. This, as a general principle, is not denied; and is too clearly established by the authorities to admit of doubt.[1] What acknowledgment, or other act done within the twenty years, shall be sufficient to entitle it to be deemed, between the parties, a subsisting mortgage, may be matter of discussion, according to the circumstances of each case. But no one can doubt, that a solemn acknowledgment in writing made within the twenty years by the mortgagee, that he deems it a mere security, will open the estate to redemption. The authorities are pointed to this effect.[2]

Now, in the present case, there is the most solemn and pointed admission by the mortgagee, in his answer to the bill filed in 1821 against him for an account, as administrator of Jonathan Arnold, that he then held this estate as a mortgage, and only as a mortgage, under Jonathan Arnold. This admission was in a suit between third persons, and not between the parties now before the Court. But that circumstance does not vary its force. It is still an admission, and a most solemn one under oath, by the mortgager; and, as such, ought to bind his personal and real representatives, although it would not bind third persons. Cases are cited in the note to Mr. Rand's valuable edition of Powell on Mortgages, by Coventry, (Vol. I. p. 385, note 1,) which are directly in point; and we gladly refer to them in their compendious form, as satisfactory and conclusive. Then, again, it may be suggested, that there cannot be any redemption of a mortgage, unless of all the premises contained in the original mortgaged deed;

[1] See Powell on Mortg., by Coventry and Rand, Vol. I. p. 360, and notes T, U. Id. p. 366. Id. p. 369, and note B. Id. p. 370, note C. Id. p. 392, note (1).

[2] See Powell on Mortg., by Coventry and Rand, Vol. I. p. 370. Id. p. 371, note D. Id. p. 377, note G. Id. p. 379–382, note H.; p. 385, note (1). Id. p. 386.

and, therefore, if there be a bar to any part, that operates as a bar to the whole. Our opinion is, that this objection, (if it should be made,) is not maintainable in point of law. There is neither reason nor policy to support it; and we are not aware of any case, which goes the length of establishing it. It seems to us, that the authorities, so far as they go, point the other way.[1]

The present is not a case, where the mortgagee has entered into possession to foreclose his mortgage in the manner pointed out by the Rhode Island Statutes,[2] and where his possession, for the stipulated period, bars the equity of redemption. The case stands upon the general principles of a court of equity; and the bar, if any, arises only from the rules, which it has prescribed in its own administration of its jurisdiction.

Supposing, therefore, that the other difficulties already alluded to are overcome, we perceive no solid objection to allowing the plaintiffs to redeem according to the prayer of their bill, so far as respects the Main-Street estate.

What we propose at present is to pass an interlocutory decree, dismissing the bill, as against the purchasers and proprietors of the Fox Point lots; and, retaining the bill as to the other defendants, to allow the plaintiffs to amend their bill, as to the trustees under Marcy Dexter's will, in the particulars mentioned; and, as consequent thereon, to allow the trustees to answer as to such amendatory matter. And, in order to prevent any unnecessary delay, we propose, if the trustees do not interpose any objection, to refer it to a master to take an account of what is due on the foot of the mortgage; to

[1] See Powell on Mortg., by Coventry and Rand, Vol. I. p. 385; note (1), under pp. 388, 389.

[2] See Rhode Island Acts, Digest of 1798, p. 275, and Digest of 1822, p. 209.

direct notice to James Arnold and Benjamin Arnold before the taking of the report, that they may become parties to the bill, and contest for their interests in the matter thereof; and to reserve all their rights, to be heard fully by the Court upon the merits, if they shall become parties. The question of the ultimate right of redemption by the plaintiffs, if no other parties shall appear, in the progress of the suit, than those, who are now before the Court, is to be reserved for future consideration, when the master's report comes in.

Decree accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MAINE, OCTOBER TERM, 1831, AT WISCASSETT.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
Hon. ASHUR WARE, District Judge.

WILLIAM ROBISON AND OTHERS

v.

STEPHEN CODMAN AND OTHERS.

Where there are several grantees in a conveyance, who take in trust for certain purposes, they are, under the Statute of Massachusetts of 1785, (ch. 62,) to be deemed tenants in common, and not joint tenants.

If one joint tenant convey his share, that is a severance of the joint tenancy.

In Maine, a husband is entitled to hold a trust estate of his wife, as tenant by the courtesy.

A widow is not entitled to dower, in a trust estate held by her husband for third persons; nor in a reversion or remainder in a legal estate held by her husband.

Where the legal estate and the trust estate are co-extensive, (as in fee,) and both become vested in the same person, there is a merger of the trust estate in the legal estate.

An administrator has no authority to sell an estate held by his intestate in trust for other persons, as assets to pay the debts of the intestate.

THIS was a bill in equity, brought to determine the respective rights and interests of the several parties, plaintiffs and defendants, in certain lots of land in Portland, under the circumstances set forth in the bill. The bill was substantially

as follows, those parts of it being omitted which are not necessary to a correct understanding of the points submitted by the parties, and decided by the Court.

Thomas Robison, senior, ancestor of the plaintiffs, a citizen of the Commonwealth of Massachusetts, resident in Portland, being seised and possessed of large estates in fee, and of large personal property, made his will August 7th, 1798, containing a devise and bequest to his wife, Elizabeth Robison, in the following words, viz. "I give, devise, and bequeath unto my beloved wife, Elizabeth Robison, the interest of all the moneys, notes, and bonds, that I may have, or which may be due to me at the time of my decease; also I give, devise, and bequeath unto my said wife, the use and improvement of all my estate, both real and personal, of whatever kind, name, or nature, whether lands, houses, stores, wharves, vessels, and every other kind that I may own or be possessed of at the time of my decease, for and during the time she shall remain my widow; and if she choose to marry, then I give, devise, and bequeath to my said wife the use and improvement of one third part of all my real estate, during her natural life, and one third part of all the personal estate that I may be possessed of at the time of my decease, to her, and her heirs and assigns, for ever." And in said will, the testator further devised and bequeathed to his daughters, Hannah Codman, since deceased, wife of Stephen Codman, Jane Hodges, since deceased, widow of Thomas Hodges, Martha, Ann E., and Eliza, plaintiffs, and to his sons, Thomas and Richard, since deceased, and to his son William, plaintiff, and their heirs and assigns, for ever, "the whole of his estate, real and personal, which might remain after the decease or marriage of his said wife," to be equally divided between them, reserving the interest of his said wife therein, as aforesaid. And he appointed his said wife, and Richard

Cartwright, his brother-in-law, Stephen Codman, his son-in-law, now resident of Boston aforesaid, and a citizen of the Commonwealth of Massachusetts, Thomas Robison, Jr., his son, and his friend, Arthur McLellan, to be joint executors of his said will. Afterwards, viz. June 14th, 1802, the said testator for the nominal consideration of 30,000 dollars, when in truth nothing valuable was paid or secured, conveyed to said Arthur McLellan, by deed of general warranty, certain real estate lying in said Portland, being parcel of the estate devised in said will.

The said McLellan, at the time of the execution and delivery of said deed to him, made and delivered to said Thomas Robison, the grantor, his bond, conditioned that he would hold the estate so conveyed to him in trust for the said grantor, and permit him to take the rents and profits thereof at his pleasure, or account with the said grantor for the same; and that he, the said McLellan, would convey said property to such persons as the grantor had or should, by deed or by his last will, order and designate as the grantees or devisees of the same, or of his estate and property in general.

Afterwards, on the 27th day of March, A. D. 1806, the said Thomas Robison died in the actual and open possession of all the said lands, which he had continued to possess and enjoy ever after the making his said deed to said McLellan, in the same manner as before; and his will was duly proved in the Probate Court of the County of Cumberland in said district, July 23d, 1806, and letters testamentary thereon were granted in due form of law to Richard Cartwright, one of the executors therein named, the other persons named as executors having declined that trust.

After the decease of said Thomas Robison, the said McLellan, on the 28th day of July, A. D. 1806, conveyed the same real estate by deed to the said Stephen Codman,

Thomas Robison, Jr., and to Robert Ilsley, then resident of said Portland, who had become the second husband of said Jane Hodges, and at the same time said Cartwright delivered up to said McLellan his bond aforesaid to be cancelled; and at the same time the said Stephen Codman, Robert Ilsley, and Thomas Robison, Jr. gave to said Cartwright their bond, conditioned that, whereas the said lands, notwithstanding the deed of conveyance thereof to said McLellan, were really and truly the estate of the said Thomas Robison, deceased, they, the said obligors, "should hold the same, subject to all lawful claims against the estate of said Thomas Robison, and subject to the provisions of the last will and testament of the said Thomas Robison, and should surrender the same to the aforesaid Richard Cartwright, the executor of said will, or his lawful representative, when thereunto required for the purposes aforesaid; and in the mean time should annually account for, and pay to the said Richard Cartwright, or his lawful representatives, the rents arising from the same or any part thereof." But no valuable consideration was in truth paid to said McLellan by any of the grantees named in said deed, for the conveyance aforesaid.

The said Elizabeth Robison, widow of the testator upon his decease, entered into possession of all his real estate by virtue of the will aforesaid, including the estates held in trust as aforesaid, taking the rents, income, and profits thereof, as well as of said personal estate, with the consent of the executor, administrator *de bonis non*, devisees, and heirs at law of said testator, until her decease, which happened on the 8th day of August, A. D. 1829. And at her decease there was left, as is said, of the personal property once belonging to the said testator, the amount of about 5,300 dollars vested in bank-stock, by Lemuel Weeks, administrator *de bonis non* of the said testator, and standing in his name as such, subject to the uses and purposes appointed in the said will.

On the 21st day of November, A. D. 1814, the said Stephen Codman, by his deed of bargain and sale, conveyed to his son, Henry Codman of the city of Boston aforesaid, one undivided third part of all the lands and premises described in the deed to the said Ilsley, Robison, and Codman aforesaid, he, the said Henry, at the time of said conveyance paying no valuable consideration for the same, and having full knowledge of the trusts aforesaid.

The said Thomas Robison, Jr., during his lifetime, acted as the agent of his said mother, and of his brothers and sisters in all matters touching the estate of their father; and in that capacity he received from said Richard Cartwright, executor as aforesaid, large sums of money belonging to said estate, and he died August 25th, A. D. 1823, intestate and insolvent, being at the time of his decease indebted to the said estate, as well for moneys so received as for other causes, in the sum of 17,874 dollars and 72 cents; and all his estate and property, excepting any interest which he may have had in the lands and property devised and bequeathed to the said widow Elizabeth Robison, his mother, in manner aforesaid, has been distributed to and among his creditors and his widow, according to the laws of Maine providing for the distribution of insolvent estates, thereby paying about sixty per cent. of his just debts. And he left a wife, Elizabeth Robison, and several children.

The said Hannah Codman died November 30th, 1819, in the lifetime of her mother, leaving issue the said Henry Codman, and also Stephen, Edward, and Elizabeth A. E. Codman, plaintiffs; also Richard C. Codman, who died August 17th, 1821, *under age*, leaving no widow nor issue.

The said Richard Robison also died in the lifetime of his mother, leaving issue.

The said Richard Cartwright died in the lifetime of the said widow Elizabeth Robison, whereupon the said Lemuel

Weeks was duly appointed administrator of the goods and estate of said Thomas Robinson not already administered by said Cartwright, and received letters of administration thereon, with the will annexed, according to the laws of Maine. But neither the said Cartwright, nor his lawful representative, nor the said Weeks ever demanded the surrender of the said trust estates and property for any of the purposes aforesaid; the other estate of said testator being amply sufficient for the payment of his debts, and for all other purposes of his will.

Whereupon, as the plaintiffs insist, the said trust estate created by the deed and bond last aforesaid, having survived to the said Stephen Codman, and the said Henry Codman holding one third thereof in the same trust, it was their duty, upon request, after the decease of the said Elizabeth Robison, to have surrendered and conveyed the same premises to the plaintiffs, as the devisees and heirs and representatives of the devisees thereof under the will of their ancestor, Thomas Robison, aforesaid, by such deeds of conveyance as counsel learned in the law might advise, and to have permitted the plaintiffs to enter upon and enjoy the same; saving to the said Henry Codman his part thereof, as one of the heirs of his mother, Hannah Codman, aforesaid.

And John P. Boyd, Esquire, of said Portland, lately appointed administrator of the goods and estate of said Thomas Robison, Jr., which were not before administered, is about to sell one third part of said trust property for the benefit of the creditors of his intestate, under the laws of Maine, claiming the same under said deed, as the estate of said intestate, and liable by law for the payment of his debts, and at other times claiming one eighth part of the same, as the estate of his intestate as a devisee under the will of his father for the same purposes.

And Eliza Robison, widow of said Thomas Robison, Jr., claims dower in said one third part, and at other times in one

eighth part, of said premises, under and by virtue of the laws of Maine, and of the deed and will aforesaid; and is about to sue in some of the judicial courts of Maine for the same.

Whereas the plaintiffs charge the contrary, and that the real estate, described in said deeds, came to the grantees Codman, Ilsley, and Robison in trust, and for the uses and purposes appointed and contained in the will of Thomas Robison aforesaid; that upon the decease of said grantees, Ilsley and Robison, the said estate survived to said Stephen Codman in trust as aforesaid.

That the said Henry Codman, by his said deed, took one third part thereof in the same trust, that the said Thomas Robison, Jr. at his decease, in the lifetime of his mother, had nothing in said lands and tenements which by law was liable to his creditors for the payment of his debts, nor of which his widow is dowable.

The bill closes in the usual form, praying for an injunction to restrain Boyd from selling any part of the premises, and Eliza Robison from claiming dower, &c.

The answers of Stephen Codman, Henry Codman, John P. Boyd, and Eliza Robison, admitted generally the facts stated in the bill.

Simon Greenleaf appeared for the plaintiffs; *Codman*, *Emery*, and *P. H. Greenleaf* for the defendants.

The case was submitted to the Court upon the bill and answers, without argument on either side, the bill having been originally brought by consent of all the parties concerned, for the purpose of obtaining the opinion of the Court upon the merits, and waiving all questions of form.

Story J. This case having come on to be heard by consent of the parties upon the bill and answer, and having been submitted without argument, the object of all the parties being to obtain a decree upon the merits, I consider all objections as to the want of parties, and all formal objections what-

soever as waived. I am not certain, however, that I have a complete understanding of all the points intended to be raised by the parties. But, as far as I comprehend them, I shall proceed to state what I consider the legal results in a very brief manner.

The first question is, whether under the conveyance of Thomas Robison, the testator, to Arthur McLellan, and the conveyance of the latter to Stephen Codman, Thomas Robison, the son, and Robert Ilsley, the estate of Thomas Robison, the testator, in the premises passed to Codman, Robison, and Ilsley as joint tenants or as tenants in common. My opinion is, that, under the statute of Massachusetts respecting conveyances of this sort, [Stat. March 9th, 1786, (1785, ch. 62,)] the grantees took the estate as tenants in common, and not as joint tenants, upon the trusts specified in the conveyances. And if it had been otherwise, the conveyance of Stephen Codman to Henry Codman would have been a complete severance of the joint tenancy. So that Stephen Codman, Thomas Robison, the son, and Robert Ilsley, each took one third part of the premises, as tenants in common in fee, in trust; and the trust as to Stephen Codman has now devolved on his son, Henry Codman.

The next question is, whether Stephen Codman is entitled to hold, as tenant by the courtesy, the portion of the said premises so conveyed in trust, which came to his wife as heir and devisee of Thomas Robison, the father. I think he is. By the common law, the husband is entitled to courtesy in the *trust* estate of his wife, in the same manner as he would be if it were a legal estate. Our law is, as I understand it, the same.

The next question is, whether Stephen Codman is entitled to any portion of the same trust estate, as heir of his son Richard C. Codman. I am of opinion that he is not. The estate descended to Richard C. Codman from his mother on

her decease, and he died *under age, unmarried,* and *without issue.* Under such circumstances, by the statute of Maine, as well as of Massachusetts, regulating descents, I think his share passed, not to his father, but to the other children of his mother. If he had died *over* age, it would have been otherwise, and his father would have been his heir.[1]

The next question is, whether John P. Boyd, as administrator of Thomas Robison, the son, has any right to sell any more of the trust estate conveyed to his intestate as aforesaid, by McLellan, than belonged to him as heir and devisee of his father, Thomas Robison; in other words, has he a right to sell the whole one third part vested in his intestate by the conveyance of McLellan, or only his interest in the trust estate according to the will of his father. My opinion is, that Boyd can sell no more of the estate than what belonged to his intestate as devisee of his father. An estate held by an intestate in trust for other persons, is not liable to be sold for payment of his own debts.

The next question is, whether Elizabeth Robison, the widow of Thomas Robison, the son, is entitled to dower in any part of the estate so held by her husband, under the conveyance of McLellan, and, if in any, what part. So far as her husband held the property merely in trust, it is not subject to dower, for estates held by the husband in trust are not liable to the dower of his wife. The only point worthy of consideration is, whether, so far as respected his own share in the trust estate under his father's will, there was not a merger of the trust estate in the legal estate, so as to unite them, and give him *pro tanto* a seisin in fee discharged of the

[1] R. C. Codman was in fact over twenty-one years of age at the time of his death; and the bill was subsequently amended so as to conform to the fact.

trust. I rather think, that this is the true legal result, as the legal estate as to his share is co-extensive with the trust estate, that is, each is a fee. If so, Mrs. Robison would have been entitled to her dower in such share of her husband, (which the bill states to be one eighth part,) if her husband had survived his mother. But, as during the life-time of his mother he was seised only of his share in the *remainder* or *reversion* after her decease, his wife can take nothing in the premises by way of dower, for dower cannot be of a mere *remainder* or *reversion.*

I am not aware of any other points intended to be raised by the parties. But if there be, it will be for them to suggest them before a decree is made.

Upon the foregoing views I am of opinion, that there ought to be an injunction to John P. Boyd against selling any more of the trust estate, than by the devise of the testator came to the share of his son, Thomas Robison, Jr.; that the plaintiffs are entitled to have a decree for their respective shares in the trust estate to be conveyed to them; that Stephen Codman has no title in the premises, except as tenant by the courtesy; and that Elizabeth Robison has no right or title to dower in the premises. The case ought to be referred to a master to consider and report, what conveyances ought to be made, and by whom, to the plaintiffs in the premises; and in the mean time, all further orders are to be reserved until the coming in of the master's report.

The District Judge concurs in this opinion, and therefore let a decree be entered accordingly.

Note. The parties at May Term, 1832, waived going to a master, and entered into arrangements, conforming exactly to the decree upon the merits.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1831, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

FRANKLIN RICHMOND *v.* SIMEON DREYFOUS.

Under the Judiciary Act of 1789, (ch. 20, § 11,) no foreign attachment can be maintained against the principal defendant, unless he is an inhabitant of the District, where the suit is brought, or he is found within it at the time of the service of the process. A service upon trustees or garnishees within the District is not sufficient to found a judgment against the principal.

THIS was an action of trover. The only service of the writ was made by serving Hymen A. Hart of Philadelphia, who was, at the time of the service, in Newport in Rhode Island, and Alfred Pratt and Joseph A. Carr, both of Providence, with copies of the same, according to the supposed provisions of the statute of Rhode Island, regulating foreign attachments, for the purpose of attaching the property of the principal defendant, Simeon Dreyfous of Philadelphia, in their hands. The affidavit of Hart, duly sworn to, was produced, and the other two garnishees were present in Court, ready to make a like affidavit, if required so to do. But the defendant, Dreyfous, interposed a plea to the jurisdiction of

the Court, setting forth, that at the time of the pretended service of the writ, he was *a citizen of another State and District*, and not a citizen of the State or District of Rhode Island, nor found within the same; and, therefore, that there was no legal service of the writ, according to the laws of the United States. The facts stated in the plea were admitted to be true.

STORY J. The Court are of opinion, that the facts stated in the plea, although not drawn up with technical propriety and exactness, constitute substantially a good defence in abatement of the suit. The Judiciary Act of 1789, (ch. 20, § 11,) declares, that "no civil suit shall be brought before either of said Courts (of the United States) against an inhabitant of the United States, by any original process in any other District than that, whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." The present is a writ of foreign attachment or garnishment, in which the principal defendant, Dreyfous, is admitted to be an inhabitant of Philadelphia in Pennsylvania; and he was not found, nor has any process been served upon him, in the District of Rhode Island; but the only service has been on his supposed trustees or garnishees. The case, therefore, falls directly within the statute; and as there can be no judgment against the principal defendant, there can be none against his supposed trustees or garnishees. The suit must therefore be abated.

Judgment accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

NEW HAMPSHIRE, MAY TERM, 1832, AT PORTSMOUTH.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN S. SHERBURNE, District Judge.

UNITED STATES

v.

EDWARD CUTTS, ADMINISTRATOR OF N. LYDE.

A, owning certain five per cent. stock of the United States, borrowed $ 1960 of B on a note payable in four months, and made an assignment of the stock, with a power of attorney to transfer it on the books of the bank, and delivered the certificate of the stock to B, who was to sell the stock, if the debt was not paid when due. A died before the note became due, insolvent and indebted to United States, who claimed a priority of payment. The stock was never transferred on the public books during A's lifetime. After his death his administrator sold the stock, and applied the proceeds to the payment of B's debt. It was held, that B took an equitable interest by the assignment in the stock, notwithstanding the Act of 1790, ch. 61, [34,] had declared, that transfers should be made only on the books of the government by the party in person, or by his attorney, and that the payment by the administrator was not a misapplication of the assets.

The Act of 1790, ch. 61, [34,] did not intend to interfere with, or prohibit, equitable titles or claims on stock; but only to fix the legal title between the government and the holder.

Stock held by a trustee, (and the holder after an assignment is a mere trustee,) is not assets in the hands of his administrator or assignees.

THIS was an action of debt on an official bond, given by Lyde, (the intestate,) for the faithful performance of his du-

ties as purser in the Navy. The parties agreed to a special statement of facts as follows.

"It is agreed that the defendant's intestate was a purser in the Navy of the United States, and that the bond mentioned in the plaintiff's writ was given by the said Lyde for the faithful performance of his official duties as such purser. The said Lyde died on the 7th of July, 1828, and in June, 1829, a balance was stated by the accounting officers of the Treasury to be due from the said Lyde's estate to the United States, of $ 5522·08. The defendant immediately afterwards paid to the United States the sum of $ 3857·75, being the amount of assets in his hands, unless the Court shall be of opinion on the facts following, that he had a further amount. On the 1st day of July, 1828, the said Lyde borrowed of Thomas Sheafe the sum of $1960, and gave his note for that sum to said Sheafe, payable in four months, and also delivered to said Sheafe a certificate of five per cent. stock of the United States, standing on the books of the Bank of the United States, at Boston, for $1960, and executed and delivered to him an instrument of which the following is a copy: — 'Know all men, by these presents, that whereas I, Nathaniel Lyde, of the United States' Navy, have obtained a loan of Thomas Sheafe, of Portsmouth, N. H., Esq., on my promissory note, bearing date this first day of July, 1828, for $1960, payable in four months and grace from the date hereof, and I have agreed to pledge $1960 of United States five per cent. stock, redeemable after the year 1832, belonging to myself, the certificate whereof has been delivered to said Sheafe, previous to the execution hereof, for drawing the payment of said note. Now know ye, that, in consideration of the premises, and for value received, I do hereby assign all my interest in said stock to said Thomas Sheafe, in trust and for the purposes aforesaid; and I do

authorize and empower the said Thomas Sheafe, in person or by substitute in his name, to sell, assign, and transfer, unto any person or persons, as much of said stock as may be necessary to pay whatever may be due on said note, together with the necesssary expenses attending the same. In witness whereof I have hereunto set my hand and seal, the first day of July, A. D. 1828. NATHANIEL LYDE. (*Seal.*)

"'Sealed, &c. in the presence of

RICHARD R. WALDRON,

W. B. PARKER.'

"And the said Sheafe, at that time, made to said Lyde a receipt in the following words: — 'Portsmouth, N. H., July 1st, 1828. I acknowledge to have received of Nathaniel Lyde, Esq., a certificate of United States five per cent. stock for nineteen hundred and sixty dollars, as collateral security for a note of said Lyde to me for that sum, which certificate is to be returned to said Lyde, also the assignment of said stock, whenever said note is paid.

THOMAS SHEAFE.'

"The said Lyde died on the 7th of July, 1828. After the said note became payable, the said Sheafe applied at the office of discount and deposit of the Bank of the United States at Boston, to make a transfer of the same, which was refused at said office on account of the death of the said Lyde; and on the 15th of January, 1829, the said Cutts, as administrator as aforesaid, on said Sheafe's giving a bond to indemnify him, transferred the said stock on the books of said office, to said Sheafe, in payment of said note and interest, and nine dollars and eighty cents, which sum constituted part of the money paid by the said Cutts to the United States. The said Sheafe allowed the current price at Boston, for stock of that denomination. The circumstances and amount of said Lyde's estate were not known at the time of the transfer. His estate has since been represented insolvent.

"If the Court are of opinion, that the said stock, under the foregoing circumstances, constituted assets in the hands of the said Cutts, as administrator, the defendant is to be defaulted, and judgment rendered for the sum of $ 1664.33, debt, and costs, in common form, and execution to issue. If otherwise, judgment is to be rendered in favor of the plaintiffs for the same sum, to be levied on the goods and chattels, which were of the said Lyde, and which shall hereafter come to the hands of the said Cutts, as administrator as aforesaid, to be administered. It is understood, that the defendant is not to be prejudiced by the foregoing statement from claiming further allowances, which he claims to be equitably due from the United States to the estate of said Lyde."

The cause was argued at the last October Term at Exeter, (N. H.,) in the absence of the District Judge, by *Mason* and *Durell* for the plaintiffs, and by *E. Cutts* and *Bartlett* for the defendant.

For the plaintiffs it was contended, that there was no legal transfer to Sheafe by the instrument stated in the case, in the lifetime of Lyde. The transfer by the Act of 4th of August, 1790, ch. 61, (1 U. S. L. 112,) could be made only on the books of the Treasury, by the party or his attorney; and this provision extended to all subsequent acts respecting the transfer of the public debt. The certificates of the public debt on their face purport "to be transferable *only* at the bank," by the party or his attorney. If this be so, then, by the death of Lyde, the transfer was extinguished; and, Lyde's estate being insolvent, the United States were entitled to the statute priority given to the government by law, and the administrator had no right, as against creditors, to make the transfer for the benefit of Sheafe. The instrument of agreement did not make any transfer of the stock, or show an intention to make any immediate transfer. The words

are, that Lyde has agreed to transfer, not that he has transferred. No transfer was to be made, until after the note became due, and was unpaid. And so the receipt of Sheafe purports. If these positions are correct, then Sheafe had no lien on the stock. The delivery of the certificate would not make any difference, or give any lien on the stock; and the power given in the instrument was a mere verbal power, not coupled with any interest. There was no mistake, no fraud, and no error. The parties did exactly what they intended. The case, then, falls directly within the authority of *Hunt* v. *Rousmanière's Administrator*, (2 Mason R. 244, 342; *S. C.* 3 Mason R. 294; *S. C.* 8 Wheaton R. 174; and 1 Peters R. 1.) Against other creditors, in a case of insolvency, a Court of Equity would not give any relief. So it was held in *Hunt* v. *Rousmanière*. It would not overrule the express provisions of the statute, as to the mode of transfer.

For the *defendant* it was argued, that the instrument was not a mere power of attorney. In the beginning, it is true, it is stated, that Lyde had agreed to pledge, &c.; but afterwards it is expressly stated, that he does thereby *assign* the stock. It is a power, then, coupled with an interest in the stock. It is true, that it was not a transfer at law, but it was in equity, and transferred Lyde's interest in the stock; and so the power was irrevocable, and survived the death of Lyde. A trust coupled with a power or interest survives. (4 Dane's Abridg. ch. 135, art. 6, § 4, 8.) The intention was to give Sheafe a complete lien on the stock. The certificate was delivered to Sheafe, and no transfer could be made on the books of the bank without delivering it up. *Hunt* v. *Rousmanière* was a case of a mere naked power. The intestate remained in possession of the vessel. The loan officer, after Lyde's death, might properly have allowed Sheafe to trans-

fer the stock. The administrator has done no more than his duty.

The statute (August 4th, 1790, ch. 60,) as to transfers is a mere regulation between the government and the stockholders, with regard to the legal interest, and who shall be deemed owners, as between them. It did not intend to touch any assignments or transfers between the holders and third persons. Sheafe was an assignee of a chose in action, and as such he had a power conferred with an interest. *Wheeler* v. *Wheeler*, 9 Cowen R. 34.

The Administrator might have been compelled in equity to make this transfer; and if so, there is no devastavit, or misappropriation of the funds.

Story J. This cause was argued fully at the last term; and entertaining, as I did, considerable doubts upon it, at and after the argument, it was continued for advisement until this term. In the mean time, I have bestowed no inconsiderable reflection upon the subject, and have availed myself of all the information within my reach, as I deem the decision of great practical importance.

The question, upon the statement of facts, comes to this, whether there has been any misapplication of the assets of Lyde, the intestate, by his administrator, in the sale and appropriation of the five per cent. stock to the payment of the debt due to Sheafe, Lyde's estate being insolvent, and the United States, in such a case, having, under the statute of March 3d, 1797, (ch. 74, § 5,) a right of priority of payment of all debts due to the government out of his assets. And that depends upon this farther question, whether the instrument under which Sheafe claims a right to the stock in controversy, and the deposit of the certificate with him, were a sufficient equitable assignment of the stock, or gave a sufficient lien thereon to defeat the priority of the United States.

In order to arrive at a just conclusion upon this point, it will be necessary, in the first place, to ascertain, what is the true interpretation of the terms of the instrument; and in the next place, what is the legal operation of those terms, when their meaning is thus ascertained. The instrument begins by reciting, that Lyde had obtained a loan of Sheafe on a note dated the 1st of July, 1828, for $ 1960, and payable in four months and grace; and that Lyde had "*agreed to pledge*" $ 1960 of United States five per cent. stock, redeemable after the year 1832, belonging to himself, the certificate whereof had been then delivered to Sheafe, for securing the payment of the note; and it then proceeds to declare, that in consideration of the premises, he, Lyde, did thereby "*assign all* [his] *interest in said stock*" to Sheafe, in trust and for the purposes aforesaid; and he then constituted Sheafe his attorney in person, or by his substitute in his [Sheafe's] name, to sell, assign, and transfer unto any persons, so much of the stock as may be necessary to pay whatever may be due on the note, with the necessary expenses. The intention to pledge the stock, as security for the note, is unquestionable; and in execution of this intention, there is an actual delivery of the certificate, and an assignment, in appropriate words, of all his [Lyde's] interest in the stock, and an authority to sell and transfer the same. It is not, then, the case of a mere unexecuted agreement to pledge the stock; nor a mere naked delivery of the certificate, as the sole pledge; but, so far as the parties could execute the agreement of pledge, without an actual transfer of the stock on the books of the bank, they have perfected the pledge by an assignment of the interest, and a delivery of the certificate. The power of attorney is not a mere naked power, uncoupled with any interest, according to the intention of the parties; but, if such is its effect, it results from prin-

against the debtor.[1] In the case of *Lepard* v. *Vernon*, (2 Ves. & B. 51,) the whole scope of the reasoning of Sir William *Grant* shows, that if the debt had been assigned, the power, given to collect it, would have been deemed a power coupled with an interest, and the assignment a sufficient appropriation of the debt, so as to prevent it from becoming a part of the assets of the deceased in the hands of his administrator.

There is nothing, then, in the analogies of the law, which prevents a Court of Equity from holding the assignment in the present case from operating as an equitable appropriation of the stock, notwithstanding the statute does not contemplate any but a legal transfer of the stock, and directs such transfer to be made, and to be made only in a particular prescribed manner. These analogies show, that a transfer, void at law, may yet be upheld as an equitable appropriation, unless there be some prohibition by positive law.

Then, as to the authorities. They are not, perhaps, all reconcilable with each other; but there is a sufficiently strong body, in support of the views already suggested, to justify the Court in its present decision. In the case of *United States* v. *Vaughan*, (3 Binn. R. 394,) certain shares in the bank of the United States had been transferred by the holders in London to a purchaser there, the certificate of the stock delivered to the purchaser, and a blank power of attorney to transfer them on the books of the corporation in America. The stock was attached by a process of foreign attachment before any actual transfer had been entered upon

[1] See *Row* v. *Dawson*, 1 Ves. R. 331; *Mandeville* v. *Welch*, 5 Wheaton R. 277, 285, 286; *Clarke* v. *Adair*, cited by Buller J. in *Master* v. *Miller*, 4 T. R. 343; *Cutts* v. *Perkins*, 12 Mass. R. 206, 211; Ex parte *Alderson*, 1 Madd. R 53.

the books of the corporation. By the charter of the bank, (Act of 1791, ch. 84,) it was provided, that, "the stock of the said corporation shall be assignable and transferrible according to such rules as shall be instituted in that behalf by the laws and ordinances of the same;" and by a by-law of the corporation the stock was made transferrible only at the bank on its books by the proprietor personally, or his attorney. The argument was, that under these circumstances the transfer was void, and the attachment good. But the court held, that the sale and other proceedings operated as an equitable assignment to the purchaser; and that the attachment was void. There is an elaborate opinion of Mr. Justice *Yeates*, from which I will quote a single passage directly in point. "In what relation, then," says he, "previous to a formal transfer, did the original contracting parties stand towards each other? As between them, it is conceded, there subsisted a certain degree of equity; and why not a trust? B. S. B. (the holders) ceased to have a beneficial interest in the shares of the bank stock, which they had sold at a full price. It is true on the face of the books they were the nominal stockholders; and a payment of the semi-annual dividends to them would have justified the directors of the bank. But had the power to transfer been revoked by the death of the attorney before its execution, or had it been consumed by fire, a Court of Equity would certainly have decreed a specific execution of the contract, &c. I, therefore, view B. S. and B. for the purposes of the present argument, as mere trustees for the claimants, against whom a chancellor would enforce a specific execution of their contract &c.; and thinking, as I do, that the United States can have no claim on bank stock, which their debtors had sold *bonâ fide*, &c., I am of opinion," &c. Mr. Justice *Brackenridge* concurred, holding, that the by-law did not exclude the passing of an equitable interest.

The case of *Quiner* v. *The Marblehead Insurance Company*, (10 Mass. R. 476,)[1] is quite as strong. In that case the charter contained a clause, that no transfer of any share in said company shall be permitted, or be valid, until the whole capital stock shall be paid in. One half only had been paid in; and one of the stockholders assigned his shares to a purchaser. These shares were subsequently attached by a creditor of the stockholder; and the main question at the trial was, whether the creditor, or the purchaser, was entitled to the stock. The Court held, that the prohibitory clause was not intended, as a general prohibition of transfers, but merely to prevent speculation in the scrip, and to continue the responsibility of the original subscribers, in case of loss, beyond the funds actually vested. The Court said, that by this provision the transfer could not be complete, and essential to all purposes, until the full amount was paid in; but that the creditor may be substituted for the debtor, and may acquire the right, upon payment of the residue of the subscription, to have the transfer entered upon the books; and that in the case then before the court the purchaser had the *equitable interest* in the shares, and the company would be justified in issuing certificates to him.

In the case of *The Union Bank of Georgetown* v. *Laird*, (2 Wheaton R. 390), the charter contained a clause, that, "the shares of the capital stock, at any time owned by any individual stockholder, shall be transferrible only on the books of the bank, according to such rules as may, conformably to law, be established in that behalf by the President and Directors;" but all debts due to the bank must be first satisfied. The question was, whether a creditor, to whom the shares were assigned, as security, was, under the circumstances, entitled to a transfer of the stock without satisfying the debts due to the

[1] See also *Sargent* v. *Franklin Insurance Company*, 8 Pick. R. 90.

bank. That is not the point here; but the material consideration is, that the Court in that case treated it as a valid *equitable assignment.* "No person," said the Court, "can acquire a legal title to any shares, except under a regular transfer according to the rules of the bank; and if any person takes an *equitable assignment,* it must be subject to the rights of the bank under the act of incorporation." The same point was directly decided in *The President &c. of Bank of Utica* v. *Smalley,* (2 Cowen R. 770.) There, the charter declared, that, "no transfer of stock shall be valid or effectual until such transfer shall be registered in a book or books kept for that purpose by the Directors," and unless the person making the same shall previously discharge all debts due by him or her to the corporation. The holder made an assignment of shares in Paris, which was not registered; the question was, whether it passed, as between vendor and vendee, the interest in the stock. The Court held, that the transfer was valid between the parties without registration, though the purchaser must take, subject to the rights of the bank. The doctrine in *Sargent* v. *The Franklin Insurance Company,* (8 Pick. R. 90,) leads to the same result.

I am aware, that there are cases, in which a doctrine, apparently different, has been maintained.[1] Those cases are susceptible of this explanation, that the terms of the acts of incorporation were construed to mean, that the registration of the transfers was the origination of the new title, and not merely a legal completion of a previous inchoate title. Several of those cases turned upon the right of attachment of creditors according to the local laws, which operated upon

[1] See *Marlborough Manufacturing Company* v. *Smith,* 2 Connect. R. 579; *Newton* v. *Bridgport Turnpike Company,* 3 Connect. R. 544; *Northrop* v. *Curtis,* 5 Connect. R. 246; *Oxford Turnpike Company,* v. *Bunnel,* 6 Connect. R. 552.

the legal title; and the only other case[1] involved the sole question, whether an equitable assignee was liable for instalments as a legal stockholder; and it was held that he was not.

It might be sufficient to say, that the case at bar involves no point as to the priority of any attaching creditor, nor any question as to the legal ownership of the stock. The whole argument turns upon an equitable interest, and a lien consequent thereon. If these cases are not to be explained in this manner, but turn upon the more general principle already stated, with all possible deference to the learned Judges, who decided them, they do not appear to me founded on as solid grounds, as those, which maintain a different doctrine. In a conflict of authority, my judgment goes with the latter. The case of administrators is not distinguishable from that of assignees in bankruptcy. In each case the assets are bound by the same equities, which would affect the vendors; and the administrators and assignees cannot place themselves in a better situation than the principal; but are bound by the same equities, which bind him.[2] It is true, that where the equities of all the creditors are equal, a purchaser cannot entitle himself to a priority of satisfaction; but that cannot be, where one has already acquired a lien or equitable title.

Upon the whole, my judgment is, that there has been no misappropriation of the assets by the administrator; but that the equitable interest in the stock was vested in Sheafe; and he had a right to have it sold to discharge the debt due to him. Judgment is, therefore, to be rendered against the defendant, pursuant to the agreement of the parties only for future assets, *quando acciderint*.

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[1] *Marlborough Manufacturing Company* v. *Smith*, 2 Connect. R. 579.

[2] See *Milford* v. *Milford*, 9 Ves. 86, 100; *Yewson* v. *Moulson*, 2 Atk. 417, 420; *Row* v. *Dawson*, 1 Ves. 331; *Tyrrell* v. *Hope*, 2 Atk. 558; Ex parte *Byas*, 1 Atk. 124.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1832, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

THE BRIG GEORGE, JOSEPH WESTCOTT AND OTHERS, CLAIMANTS.

A mate, succeeding to the command of the ship upon the death of the master, does not thereby lose his character as mate; but may sue in the Admiralty for his wages.

He is also entitled to be cured at the expense of the ship, in the same manner, as a seaman. And, therefore, if he is put on shore from sickness for the convenience of the ship, his expenses for medicines, advice, attendance, and board, are to be borne by the ship-owner.

It seems, that the like rule applies to a master.

THIS was a libel for mariner's wages in the Admiralty, originally against the vessel, and now proceeding against the owners. Upon the hearing of the cause in the District Court, it was decreed, that the libellant was entitled to wages to the amount of fifty-four dollars and fifty cents and costs of suit. From this decree the owners entered an appeal to the Circuit Court; and at the present term the cause was argued by *Curtis* for the appellants, and by *Nichols* for the appellee.

STORY J. This is a libel instituted by the libellant in the Admiralty for wages, due to him, as mate of the Brig George, for a voyage from Boston to St. Jago, in the Island of Cuba, and back to the United States. There is no dispute as to the claim for wages, the amount being admitted. But the owners bring forward a claim in the nature of a set-off for money expended for the libellant on account of his sickness on shore at St. Jago. The items of the account are for board, washing, apothecary's bill, physician's bill, and wine supplied for the libellant, amounting in the whole to $ 74·75. It is not denied, that the expenses have been incurred, and paid by the owners; and the sole question is, whether they are to be borne by the owners of the Brig George, or by the libellant, there having been a suitable medicine chest and medical directions on board for the voyage, according to the requisitions of the act of Congress.

The facts are, that the master of the brig died at St. Jago, of the yellow fever, and the mate upon his death, with the consent and approbation of the consignee and the American consul, assumed the command of the vessel. The mate was at this time ill with symptoms of the same disease; and, the vessel being at that time about to proceed to another port in Cuba to take in a part of her cargo, it was deemed the most prudent step for the mate to go on shore, both for his own relief and the safety of the crew; and that the vessel should proceed to the other port under the command of the pilot. She accordingly did so. proceed, and returned again to St. Jago after an absence of fourteen days. The libellant was then on the recovery, and resumed his station on board. But subsequently, when the vessel was about to depart for the United States, it was deemed most advisable by the libellant, and the consignees, that another person should be appointed master; and he was accordingly appointed, and the libellant

returned to the United States in the brig, performing only the duties and functions of mate.

It is not now controverted, that the conduct of the libellant in going on shore during his illness was wise and prudent, and for the interest of all concerned; nor that the subsequent appointment of another person, as master for the voyage, was not equally advisable under all the circumstances. The point of defence, or rather of set-off, rests on another ground; and that is, that as the mate was, at the time the expenses were incurred, acting as master of the vessel, he is not entitled to be cured at the expense of the ship, but at his own personal expense.

In the case of *Harden* v. *Gordon* (2 Mason R. 541,) the question of the liability of the owners to pay the expenses of curing seamen, who are taken sick in the course of the voyage, was largely discussed. It was there held, that, by the general maritime law, the expenses of sick seamen are to be borne by the ship; and that in these expenses are to be included, not only medicines and medical advice, but nursing, diet, and lodging, where these are necessarily incurred; that the Act of Congress (Act of 1790, ch. 29, § 8,) had not changed the maritime law, except so far as respects medicines and medical advice, where there is a proper medicine chest and medical directions on board; and that the Act of Congress was inapplicable to cases, where the seamen are sent on shore for the safety or convenience of the ship, and in all such cases the maritime law remained in full force. There was some peculiarity in the circumstances of the case of *Harden* v. *Gordon*, which did not call for so exact and determinate an expression of the opinion of the Court, as is now announced; but the whole reasoning of the Court leads to this conclusion, and, indeed, cannot otherwise be maintained. I do not, therefore, go over the general doctrine,

being quite content to leave it upon the arguments then adduced in its support. But I feel bound to say, that I have never, since that time, had the least inclination to withdraw from any part of that opinion. But if I had, it would rather be to enlarge, than limit the construction favorable to the seamen. I then had, and continue to have, great doubt, whether the Act of Congress ought to have been allowed to have any operation as an exception out of the maritime law; and whether the provision for a proper medicine chest was not merely directory, and the omission made penal upon the master personally, without the slightest intention on the part of Congress to interfere with the general duties and responsibilities of the owners, created by the maritime law. Be this as it may, the present case does not call for any review of that point.

In the present case, if the mate had remained in his station as mate, and the master had been living, and with a view to his own accommodation, and the convenience of the ship, and the safety of the crew, he had been removed on shore with the consent of the master, I should not feel the slightest difficulty in saying, that all the expenses in question must be borne by the ship. The attendance, and watching, and nursing, and preparation of suitable food, for sick seamen on board, independent of all other considerations, is a very serious interruption of the common ship's duty and business, and often imposes hardships upon other seamen, which may endanger their ability to attend fully to other duties, and often may prove injurious to their present health. And if a speedy recovery of the sick seamen, and the preservation of human life be an object, (as it ought ever to be,) to ensure a prompt return to duty, and a speedy performance of the voyage, it is a matter of the highest prudence in a considerate master to take every measure calculated to produce

these results. The attendance and medical advice and nursing, which can be obtained on shore, are far more regular, intelligent, and beneficial, than any, which can be obtained on board of the ship amidst the hurried duties of a seafaring life. And the hiring of new seamen in foreign ports to supply the place of those, who are ill, or die, is often a most inordinate and oppressive charge upon the owners. Public policy, as well as the ordinary claims of humanity, demands, that the interests of the seamen should be in these respects linked to those of the ship; and, thus, new means are furnished to enforce Christian duties and Christian responsibilities. I confess, that with these views, I should have the utmost reluctance to do away one jot or tittle of the provisions of the maritime law, acting so wisely and beneficially on this subject.[1]

Is there any thing then in the present case, which takes it out of the ordinary range of the principles already stated? It is said, that the allowance by the maritime law belongs to the seamen only, and cannot be claimed by the master of the ship. The latter, it is said, stands upon different grounds, both as to rights and privileges, from them; and that his own expenses for illness are to be borne exclusively by himself. No authority is cited for this position; and I am not aware, that any exists. So far as the reason and policy of the law go, I can perceive no difference between the case of the master and the case of any of the other officers, or crew of the ship. The interest of the ship-owner is equally promoted in each case by a speedy recovery and return to duty; and the benefit is even of a higher nature, both for the ship and

[1] See Pardessus, Droit Commercial, 3 Tom. P. 3, tit. 3, ch. 1, § 2, § 5, p. 132; Id. p. 110; Code de Commerce, art. 262; Jacobsen's Sea Laws, B. 2, ch. 2, p. 144; *Harden* v. *Gordon*, 2 Mason R. 541, 548, and the authorities there cited.

the voyage. The superintending care and control of the master over all the ship's concerns is of the last importance to the interests of the owner. It must be a sad and narrow policy, utterly at variance with the liberal forecast of the maritime law, to make the master perpetually halt in his duty from the fear of incurring unreasonable personal expenses, and thus endanger the solid interests of the voyage. It is much wiser to leave to his discretion the proper times and occasions, in which he may from illness seek medical aid and other attendance on shore at the expense of his owner, rather than to hazard the great objects of the voyage upon his personal sacrifices out of his own purse for the interest of the whole concern. If such a rule were established in the maritime law, I should be bound to obey it. If not established, I will not be the first judge to introduce it. I doubt exceedingly, whether, as a matter of mere policy, it would be for the interest of the owner to introduce such a stipulation into the contract of the master, where the burthen would be all on one side, and the benefit all on the other. It might tax human ingenuity to invent some other means in the course of the voyage to shift the burthen, or at least to moderate the inequality.

The present, however, is not the case of a master; but of a mate, who clearly in ordinary cases is within the reach of the principle. But it is said, that, upon the death of the master, he succeeded to the post of master and ceased to be mate, and therefore is to be treated altogether, as if he were duly appointed master. I lay out of the case the approbation and consent of the consignee and the American consul, that the libellant should act as master. They had no authority whatsoever to change his relation to the ship. Upon the death of the master, the mate succeeded to his place *virtute officii*, by mere operation of law, without any approbation or

consent of the consignee or consul. The law throws this duty and obligation upon him; he acts in the stead of the master in all cases, where the latter is dead or absent. He does not cease to be mate in such cases; but he has thrown upon him cumulatively the duties of master. He is still a mate acting as master; not master, but *quasi* master, with the same general powers and responsibilities *pro hac vice*. He succeeds, Lord *Stowell* has said, as *hæres necessarius* to the employment of the master in a case of necessity. We all know, that here a master is entitled to sue in the Admiralty for his wages. And in England, where the master is prohibited so to sue, it is clearly established, that a mate succeeding to the master in the course of the voyage, from the death, or incapacity, or absence of the latter, may still sue for his wages, as mate, for the whole of the voyage, leaving his additional compensation, as master, to be recovered at the Common Law. So Lord *Stowell* decided in the case of *The Favorite* (2 Rob. Rep. 232); and that learned Judge thought, upon principle, the whole claim ought to be recoverable in the Admiralty; but, from too scrupulous a deference to authority (founded upon no solid reason), he waived exerting his jurisdiction over the whole claim. But the authority, there referred to, (*Read* v. *Chapman*, 2 Strange R. 937,) admits, in the most decided manner, that the mate, succeeding as master upon the death of the latter, does not lose his distinguishing character as mate. My opinion, therefore, is upon principle, as well as authority, that the mate did not cease to be mate by the death of the master, and succeeding to the command of the vessel; and, retaining his original character, that he is entitled to all the privileges annexed to it, one of which is the right to be cured at the expense of the ship. I make no distinction between the physician's bill and the other charges. Being expenses incurred on shore, they are all equally out of the

purview of the Act of Congress, and all equally within the principle of the maritime law. I give no opinion, how the case would have been, if the physician's bill had been for medical advice and attendance on board of the ship. There is great force in the suggestions of the learned District Judge on this subject; and I hope his whole opinion will appear in the Reports in connexion with the present.[1]

It has been suggested, that a usage has prevailed among merchants in Boston, by which expenses of this nature are made a personal charge on the master, and not on the owner, and by parity of reasoning, that the usage ought to apply to a mate succeeding as master. It is certainly sometimes useful, in order to ascertain what the law ought to be, in new cases open for future decision, to ascertain, what the customs and usages of merchants on such subjects generally are; for such customs and usages may have a material influence as to the rule which ought to be adopted. But, I think, the usages of a particular port or place can never be properly admitted for such purposes. Much less are they admissible, even when general, to control or alter the settled maritime law. The most, that can ever be justly allowed to such customs and usages, is to give them effect, when, from their being generally known, and invariably used, as fixed rules, they may be said to constitute a direct and positive element of the particular contract. I have long thought, that too much deference has been allowed to loose and floating customs and usages of this sort, founded on no known principle, and arising more often from ignorance of right, and mere acquiescence, than from any intentional recognition of a fixed rule. In cases of this sort I am not disposed to set up customs and usages against principles of law; or to suffer new inroads to be made upon

[1] The opinion of the District Judge will be found in the Appendix.

old doctrines. I am content to stand *super antiquas vias;* and to go, where they lead. There is a great deal of sound sense in the remarks, which fell from the Court on this subject, in the case of *Rankin* v. *The American Insurance Company* of New York, (1 Hall's R. 619, 631, 632.) Lord *Eldon* has expressed considerable doubts, as to the propriety of admitting evidence of usage to explain contracts; and as *res integra,* he declares himself opposed to it.[1]

Upon the whole, my judgment is, that the decree of the District Court ought to be affirmed, with costs.

Decree accordingly.

UNITED STATES *v.* EBENEZER BREED AND OTHERS.

The revenue or tariff act of 1816, ch. 107, lays a duty on "loaf-sugar" of twelve cents per pound. *Held,* that the words "loaf-sugar" must be understood according to their general meaning in trade and commerce, and buying and selling. And if, upon the evidence, it appeared that loaf-sugar meant sugar in loaves, then crushed loaf-sugar was not "loaf-sugar" within the act.

Rule as to the construction of statutes respecting revenue.

What is a fraudulent evasion of a duty.

DEBT on a duty bond. Plea, tender. Replication, that greater duties were due than the amount tendered; rejoinder and issue thereon.

The cause was tried by a jury, and at the trial was argued by *Dexter* for the defendant, and by *Dunlap,* District Attorney, for the United States. The latter cited 1 Peters, Cir. Ct. R. 114. Webster's Dictionary, "Loaf-sugar." Parker's R. 206; Id. 208. Hardres' R. 185. 3 Price R. 447;

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[1] *Anderson* v. *Pitcher,* 2 Bos. & Pull. R. 164, 168. See also Marshall on Insur., B. 1, ch. 16, § 5, p. 707.

Id. 189, 224, 229, 234. The former cited 9 Wheaton R. 435. 1 Pick. R. 368; and *Grennell* v. *Swartout*, Superior Court of New York in 1831, from a newspaper Report.

Story J., in summing up to the jury, said, The whole question in this case turns upon the true construction of the Tariff and Revenue Act of 1816, ch. 107, as applicable to the facts in evidence. Revenue and duty acts are not in the sense of the law penal acts; and are not therefore to be construed strictly. Nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial; and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them. We are not to strain them to reach cases not within their terms, even if we might conjecture, that public policy might have reached those cases; nor, on the other hand, are we to restrain their terms, so as to exclude cases clearly within them, simply because public policy might possibly dictate such an exclusion.

The words of the Act of 1816, ch. 107, as to duties on the article (sugar) now in controversy are as follows: "On brown sugar, three cents per pound; on white, clayed, or powdered sugar, four cents per pound; on lump-sugar, ten cents per pound; on loaf-sugar and sugar candy, twelve cents per pound." Here is a description of four different varieties of the article; and if there be any other, not embraced in either of these descriptions, then it falls within the class of non-enumerated articles, and is liable to a duty of fifteen per cent. *ad valorem*. If it be a non-enumerated article, then the sum tendered is clearly more than the duty, which is payable; and, therefore, the issue ought to be found for the defendant. Whether it be a non-enumerated article, it is not now necessary to decide; nor has it been insisted on at the

argument. If it had been necessary to decide, I should, as at present advised, incline to think, though I desire not to give any absolute opinion, that the statute meant, in the actual enumeration, to include all kinds and classes of sugars. And so it has been argued at the bar; and the controversy has been narrowed down to the inquiry, whether this is to be deemed "white, clayed, or powdered sugar," or whether it is to be deemed "loaf-sugar," within the meaning of the act. That the sugars in controversy were, at the time of their importation, in form and appearance, white, clayed, or powdered sugars; that is, that they were white, and clayed, and in powder, is disputed by no one. The whole testimony proves this; and the whole argument admits it. But on the part of the United States, it is contended, that, though this was the form of the sugar at the time of the importation, it was in fact British loaf-sugar, highly refined, and that it had been crushed from the loaves, and then imported by the defendants, not fraudulently, but *bonâ fide*, openly and without disguise, having been bought by them in its crushed state. And the argument is, that the change of form does not change the thing; it is still loaf-sugar; and the change of form is a mere evasion of the act.

The question then is, whether, in the sense of the act, the sugar is, or is not loaf-sugar. The act enumerates (as we have seen) four different classes of sugar. It does not speak of them as refined or unrefined, nor refer to any particular quality in either class. Whatever may be the quality of the sugar in either class, whether high or low, of the best or of the worst quality, all pay the same duty. Nor does the act anywhere refer to the origin or country of the sugar. It makes no difference whether it comes from Cuba or Calcutta, from England or from South America. The classification is upon other principles; in two, by color and form; in two, by form,

or rather by words usually descriptive of form. The first class is "brown sugar," and this duty is equally payable, whether it be raw brown, or refined brown sugar, and the testimony is, that refined sugar is brown until the bleaching process is finished. Here, then, no other designation is given, than by color. I speak now only as to the words of the act, without supposing, that the commercial sense is different from the common import of the words. The next is "white, clayed, or powdered sugar." It is stated in the evidence, that all white sugars are in fact clayed. But that is not material. The word, white, is here apparently used in contradistinction to brown, and we should probably read the clause, white clayed, or white powdered sugar. The latter has reference both to form and color, unless, which will presently be considered, the commercial sense differs from the common import of the terms. The next class is "lump-sugar," which seems to have reference to form, and is contradistinguished from the two former. The last is "loaf-sugar," which seems also to have reference to form, and is something different from brown sugar, white, clayed, or powdered sugar, and lump-sugar. What, then, is the specific difference? It is said, that loaf-sugar is, that sugar which has once been in loaves, however it may be now altered in form; and that, broken up or crushed, it is still loaf-sugar. The argument seems strong; but let us apply it to the evidence, and see, how it will then meet the case. It has been stated in the evidence, and not denied, that all white, clayed, or powdered sugars are first put into the form of loaves, and that the process is indispensable to give them that character. Now, if this be true, what becomes of this whole class of sugars. According to the argument, it must pay a duty of twelve cents per pound, and not four cents per pound, because a new change of form will not change the substance of the thing.

Again ; lump-sugar is, according to the evidence and the specimen in Court, in the same conical form as loaf-sugar ; why, then, when it is broken up, does it not pay loaf-sugar duty ? Why, when not broken up, does it not pay loaf-sugar duty ? Plainly, in the latter case, because, though in the same form, it has acquired a commercial name and character different from that called "loaf-sugar," which is adopted by the Act of Congress. And in the former case, it has neither the name, nor form, nor character. And this leads me to the remark, that, after all, acts of this nature are to be interpreted, not according to the abstract propriety of language, but according to the known usage of trade and business, at home and abroad. If an article has one appellation abroad, and another at home, not with one class of citizens merely, whether merchants, or grocers, or manufacturers, but with the community at large, who are buyers and sellers; doubtless our laws are to be interpreted according to that domestic sense. But, where the foreign name is well known here, and no different appellation exists in domestic use, we must presume, that, in a commercial law, the legislature used the word in the foreign sense. I say nothing, as to what rule ought to prevail, where an article is known by one name among merchants, and by another among manufacturers, or the community at large, in interpreting the legislative meaning in a Tariff Act. Congress, under such circumstances may, perhaps, be fairly presumed to use it in the more general, or more usual sense, rather than in that, which belongs to a single class of citizens. But this may well be left for decision until the very question arises. I throw out these remarks only with reference to the case cited at the bar from the Superior Court of New York, a court certainly of great ability and learning.

What, then, is meant by "loaf-sugar," in a commercial

sense, by which I mean, not merely among merchants, but among buyers and sellers generally in the domestic trade? Has it any generally received, uniform meaning? If it has, then, that must be presumed to be the meaning adopted by the legislature in the Act of 1816. I agree to the law laid down in the case of *Two Hundred Chests of Tea, Smith, Claimant*, 9 Wheaton R. 435. That case was as fully considered, and as deliberately weighed, as any, which ever came before the Court. It was there laid down, that, in construing Revenue Laws, we were to consider the words, not as used in their scientific or technical sense, where things were classified according to their scientific characters and properties, but as used in their known and common commercial sense, in the foreign and domestic trade. Laws of this sort taxed things by their common and usual denominations among the people, and not according to their denominations among naturalists, or botanists, or men of science.

Nor is there any thing extraordinary in Congress taking articles according to their colors, or forms, or any other peculiarity. Sometimes the tax is levied upon a thing with reference to the country of its origin; sometimes according to its colors; sometimes according to its predominant component material; sometimes in its raw shape; sometimes in its manufactured shape; and sometimes, with reference merely to its form or mode of manufacture, or the vehicle in which it is. Thus, by this very Act of 1816, ale, beer, and porter in bottles pay different duties from that in other vessels. Wines are taxed differently according to their origin, as Madeira, Sherry, Champagne, Burgundy; and differently, in some cases, when imported in bottles or cases, from what they are in other vessels. So raisins in jars and boxes pay a higher duty, than those in casks. Green teas pay a higher duty than black. The form of a material is also a ground for a

discriminating duty. Thus, iron or steel wire of certain descriptions pays a duty of five cents per pound, and wire of a higher number pays nine cents per pound. Iron in bars or bolts, except iron manufactured by rolling, pays forty-five cents per hundred weight; iron in sheets, or rods and hoops, $2·50 per hundred weight; and in bars or bolts, when manufactured by rolling, and in anchors, $1·50 per hundred weight. We see, that here, the form of the material constitutes the discriminating test of the duty. Doubtless in many of these cases the descriptive terms indicate the quality; not as quality, but as being usually found combined with a particular form, or a particular vehicle. It would be absurd to say, that iron did not pay a duty according to its form, as designated in the tariff; and that, if the same quality was imported in bars and bolts, and in sheets, and rods, and hoops, all must pay the same duty. So that, however true it may be, that the substance may be the same, though the form is changed, it does not follow, that the form of the substance may not be the very ground-work of the duty. Here, the duty is not laid merely on sugar, which is the generic name; but a discriminating duty is laid upon sugar of certain colors, in a certain state, or having a particular denomination, or a particular form.

It is true, that a mere change of form will not authorize a party to evade a law, or escape from its penalties. But this is a principle, that requires qualification and examination. If (as was the fact during the late war with England) an American in Canada, intending to import a piece of broadcloth into the United States from that Province, should, for the purpose of disguise, put it nominally in the form of a cloak for his personal use, it would not thereby become his mere baggage, and not dutiable. The question would still be, whether the article was designed *bonâ fide* and really, or only colorably, for

a cloak. If the latter, then it could not escape from duties or forfeiture. If the former, then the size might not be material. The question would be a question of intent and fact. The form would not necessarily exempt it from duties or forfeiture. But if the cloth were *bonâ fide* and in reality a cloak, and so designed for use, its size or other peculiarity, would not change its character as baggage. But such cases turn upon very different considerations from cases like the present. Here, the article is in a state exactly such as may be dutiable by law, under a particular description. Its form is precisely that indicated by the law. And it is assuming the whole question to say, that the change of form is an evasion of the act, much more, that it is a fraudulent evasion. If the legislature has made the form, or descriptive appellation, the basis of the discriminating duty, then the change of form to meet the discrimination is no evasion, and no fraud. The act gives the election to the party, and he has a right to make it. He does that, which the law allows, in the very manner and with the very design it allows. Besides; there is no pretence to say, that the present defendants intended any evasion or fraud. The District Attorney expressly disclaims any intention to make such a charge; and the whole facts disprove it. The honesty of the transaction is admitted to be beyond all question. To constitute an evasion of a Revenue Act, which shall be deemed, in point of law, a fraudulent evasion, it is not sufficient, that the party introduces another article perfectly lawful, which defeats the policy contemplated by the Act, or which supersedes or diminises the use of the article taxed by the Act. There must be substantially an introduction of the very thing taxed, under a false denomination or cover, with the intent to evade or defraud the Act.

I have stated these things the more at large, because the

cause is of great magnitude, and because it is quite possible, that the decision may deprive a very meretorious class of citizens of a protection, which was supposed to be given them by the Tariff Act of 1816. But this furnishes no ground upon which the Court can depart from the plain meaning of the law. It is a misfortune incident to all laws, that they are necessarily imperfect, and from human infirmity fall short of all the intended objects. But in all such cases it is the business of legislation, and not of Courts of justice, to correct the evil. We are to administer the laws, and not to make them.

Let us, then, apply the doctrines above stated to the facts of the case. The testimony contains very few discrepancies; and few that have been deemed of much importance at the argument. Upon one point, however, the testimony, as well of the government witnesses, as of those of the defendants, entirely agrees; and that is, that "loaf-sugar" in a commercial sense in the common business of life, in buying and selling, means sugar in loaves. The name doubtless carries, in some degree, an implication of quality, arising from the fact, that quality is usually associated with form; but the designation is primarily derived from, and depends upon the form. All the witnesses, whether merchants, or refiners, or grocers, or confectioners, have spoken pointedly to this fact. All of them say, that the sugar in controversy, in the form, in which it was imported (crushed sugar), is not known as, or even called, "loaf-sugar." Whatever may be its quality, it is still not "loaf-sugar," for it wants the form. A contract to buy or sell "loaf-sugar" would not be strictly complied with by a delivery of sugar in this state. It must be in loaves. Now, if this be the posture of the evidence, and it is not questioned, what is the result? The Act must, upon the principles already stated, be interpreted in a commercial sense. And if this be not "loaf-sugar" in that sense, the defence is established, and the

United States have failed to sustain their suit. I do not well know, how to put the case in any other form to the jury. The question is, whether, in point of fact the sugar in controversy is, or is not loaf-sugar in a commercial sense; and as the jury decide this, the issue is for the defendants or for the plaintiffs.

Verdict for the defendants.

United States v. John M. Thompson.

In an indictment, founded on the Crimes Act of 1790, ch. 36, § 12, for an endeavour to commit a revolt, and for confining the master of the ship on the high seas, it is not necessary to allege, that the master was at the time in the peace of the United States, or that he was an American citizen.

A cooper of the ship is a seaman within the provisions of the Act.

The jurisdiction to try the offence attaches under the 8th section of the Act of 1790, ch. 36, to the District into which the offender is first brought, or in which he is apprehended, in the alternative. So that the trial may be in either District.

An endeavour to commit a revolt may be complete, as an offence within the Act, by stirring up, or encouraging, or combining with any others of the crew to produce a disobedience to any one lawful order of the master or officers.

A confinement of the master may be complete within the Act, by any moral, as well as by a physical restraint of the master, which prevents his free movements and command of the ship. But it must in either case be an illegal restraint; for it is not an offence for the seamen to confine the master for a justifiable cause, or in justifiable self-defence.

Indictment for an endeavour on the high seas to commit a revolt on board of the ship Maine by the defendant, who was alleged to be a seaman on board; second Count, for confining the master of the said ship; against the Crimes Act of 1790, ch. 36, § 12. Plea, not guilty.

At the trial it appeared in evidence, that the ship was a whale ship belonging to American citizens, and the defendant shipped as cooper for the voyage. It appeared by the ship-

ping articles signed by the defendant, that the agreement was between the "owners, master, and mariners of the ship." It began by stating, "In consideration &c., we, the said seamen and mariners will perform a whaling voyage &c., promising to do and perform the duty of seamen as required by the master by night and by day on board of the said ship." It was proved by witnesses, that the cooper in such voyages, besides coopering, is required to hand sails, reef, steer, stand watch, and do other ship's duty of seamen on board. The offences were, if at all, committed in August, 1830. The vessel arrived at Stonington in Connecticut from the voyage, on Friday, the 8th of February, 1832; and from thence sailed to New Bedford, and arrived there on Monday following. The defendant was then arrested and committed for trial.

Bassett (of New Bedford) for the defendant, contended, 1. That a cooper was not a seaman within the meaning of the Act of 1790. 2. That the indictment was not found in the proper jurisdiction, but ought to have been in Connecticut, where the ship first arrived. 3. That it was not alleged in the indictment, that the master at the time of the offence was in the peace of the United States. 4. That the master is not alleged in the indictment to be an American citizen.

Dunlap, District Attorney for the United States, on the first point, cited 1 Ld. Raym. 632.

Story J. As to the first objection, it appears to us wholly unfounded. A "cooper" is a seaman in contemplation of law, although he has peculiar duties on board of the ship. He is so treated in the shipping articles; and he is, like common seamen, bound to do ordinary ship's duty, such as standing watch, assisting in navigation, handing sails, &c. He receives an extraordinary compensation for his duties as cooper, not as superseding but as adding to the common

seaman's duties. A cook and steward are seamen in the sense of the maritime law, although they have peculiar duties assigned them. So a pilot, a surgeon, a ship-carpenter, and a boatswain, are deemed seamen, entitled to sue in the Admiralty.[1] As to the second objection, the language of the Crimes Act of 1790 (ch. 36, § 8,) is, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the District, where the offender is apprehended, or into which he shall first be brought." The provision is in the alternative; and therefore the crime is cognizable in either district. And there is wisdom in the provision; for otherwise, if a ship should, by stress of weather, be driven to take shelter temporarily in any port of the Union, however distant from her home port, the master and all the crew, as well as the ship, might be detained, and the trial be had far from the port, to which she belonged, or to which she was destined. And if the offender should escape into another District, or voluntarily depart from that, into which he was first brought, he would, upon an arrest, be necessarily required to be sent back for trial to the latter. Now, there is no peculiar propriety, as to crimes committed on the high seas, in assigning one District rather than another for the place of trial, except what arises from general convenience; and the present alternative provision is well adapted to this purpose. As to the third and fourth objections, they do not appear to the Court well founded. The statute contains no descriptive words, that the master shall be in the peace of the United States, or shall be a citizen of the United States at the time, when the offence is committed; and it is not generally neces-

[1] See *Ross* v. *Walker*, 2 Wilson R. 264; *Wheeler* v. *Thompson*, 1 Str R. 707; *Ragg* v. *King*, 2 Str. R. 858.

sary to aver more facts than are sufficient to constitute the offence in the terms of the statute. But these objections, if they are well founded, are open upon the record upon a motion in arrest of judgment. *Objections overruled.*

Afterwards, in summing up to the jury, the opinion of the Court was delivered as follows.

STORY J. The indictment contains two counts. The first is for an endeavour to commit a revolt on board the ship. Without pretending to enumerate all the cases, which may constitute such an offence, it is sufficient to say, with reference to the facts of the present case, that a mere disobedience of orders by a seaman without encouraging, or aiding, or co-operating with others in the same act, is not an endeavour to commit a revolt. An endeavour to commit a revolt may be complete, not merely by stirring up, encouraging, or combining with others of the ship's crew to produce a general disobedience of all orders; but also by stirring up, encouraging, or combining with any one or more of the crew to produce a deliberate disobedience to any one lawful order of the master or other officers; for to this extent it is an endeavour to commit a mutiny, and to overthrow the lawful authority of the master and officers. But there must be a clear intent to produce such a revolt; and not merely gross or insolent language used by the party, which may, undesignedly, encourage others to such disobedience.

The other count is for confining the master of the ship. This may be by a moral or a physical restraint, by threats of violence with a present force, which restrains the master from his freedom of movement or command in his ship, or by physical restraint of his person. In the present case, the defendant seized the master and held him back against the ship's rail, against his will. This is, therefore, in the sense of

the Act, a clear case of confinement of the master; and it matters not, whether it was for a long or a short time, for a minute, or for an hour, or a day. The law looks to the fact, and not to the duration of the confinement. But every confinement is not an offence within the Act. It must be an illegal confinement or restraint. If the master is about to do an illegal act, and especially to do a felony, a seaman may lawfully confine or restrain him. So a seaman may confine the master in justifiable self-defence. If the master assault him without cause, he may restrain the master with so much force, and so long, as is necessary for this purpose. And, if he is suddenly seized by the master, and without any intention of restraining him of his liberty, from the mere impulse of nature, he takes hold of the master, to prevent any injury, for an instant, only, and as soon as he may, he withdraws the restraint, so that the act may be fairly deemed involuntary, it might not, perhaps, be deemed an offence within the Act, even though the seizing by the master was strictly justifiable; for the will must co-operate with the deed. But if the seizing by the master be justifiable, and he does not exceed the chastisement, which he is by law entitled to inflict, then the seaman cannot restrain him, but is bound to submit; and if he does hold the master in personal confinement or restraint, it is an offence within the statute. It is for the jury to say, how far the facts bring the case within the law thus laid down.

Verdict, guilty on the second count, not guilty on the first.

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM, 1832, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

JOSEPH HOXIE *v.* JESSE CARR AND OTHERS.

All persons in interest must be made parties to proceedings in Equity before a decree.

The mortgagees, under a conveyance made before the filing of a Bill in Equity in relation to the premises mortgaged, should be made parties; as should also the mortgager; but their omission is no necessary cause of abatement of the suit.

The abatement of a suit in Equity is merely an interruption to the suit, suspending its progress, until new parties are brought before the Court.

Where there is a transfer of interest *pendente lite*, a supplemental Bill may be filed by or against the purchasers.

Creditors are not necessary or proper parties generally in a Bill between partners to wind up the partnership concerns.

In the absence of fraud and breach of trust, property purchased with partnership funds does not of necessity become partnership property, if that is not the intention of the parties.

The circumstance, that the payment for property purchased has been made out of the partnership funds, especially if the property be necessary for the ordinary operations of the partnership, and be actually so employed, in the absence of controlling circumstances, will be decisive, that it was intended to be held as partnership property.

Upon a dissolution of a partnership, each partner has a lien upon the effects, as well for his own indemnity against the joint debts, as for his proportion of the surplus; but the creditors of the partnership, as such, have no lien upon the partnership effects for their debts.

Where real estate is purchased for partnership purposes, and on partnership account, let the legal title be vested in whom it may, as where the conveyance is taken to the partners as tenants in common, it will, in Equity, be deemed partnership property, and, like other effects, personal estate; and the partners are the *cestuis-que trust*. But a Court of Law must view it, in general, only according to the legal title.

Semble, that as between the executor or administrator of a deceased partner and his heir or devisee, it is considered, in Equity, as personalty.

Rules as to the creation of resulting trusts.

Semble, that the exception in the Statute of Frauds in England and Massachusetts, as to resulting trusts, is merely affirmative of the general law, and does not create a saving of resulting trusts, which would otherwise have been cut off, unless in writing. Accordingly, in Rhode Island, where the Statute of Frauds contains no such exception, resulting trusts are on the same footing as in England and Massachusetts.

Where purchasers of real estate, at the time of their purchase, have actual or constructive notice, that it was partnership property, it will be chargeable in their hands with the payment of the partnership debts, even though they have no notice of the existence of these partnership debts. If they have no notice, that it was partnership property, they are exonerated to the extent of the purchase-money already paid by them; and, so far as the purchase-money has not been paid, that is a substituted fund, chargeable in their hands with the same burthens as the real estate.

Circumstances under which notice will be implied.

THIS was a Bill in Equity framed with a double aspect. It stated a partnership between Joseph Hoxie the plaintiff, and Simon Reynolds one of the defendants, in the manufacture of cotton cloths, under the firm of the West Greenwich Manufacturing Company; and the possession and purchase of certain real estate, including the factory, and other appendages, out of the joint funds of the partnership, which were occupied, used, and improved, for the benefit of the partnership; a dissolution of the partnership in March, 1826, with large debts owing by the company; a parol contract for the sale by Reynolds to Hoxie upon certain conditions of all his share in the partnership property, and a part-performance in June following of the conditions of the contract of sale on the part of Hoxie, and an offer to perform the residue; a possession of the premises under the sale by Hoxie; a subsequent sale by Reynolds to Nathan Carr and Jesse Carr

(two of the defendants) of his share in the real estate aforesaid; which last sale it charges to be fraudulent, and with notice of Hoxie's contract, and with intent to defraud creditors; and it charges a subsequent payment by Hoxie of a large part of the partnership debts; and the insolvency of Reynolds. It then prays for a specific performance by Reynolds, and a conveyance by his grantees according to his contract with Hoxie, and for an injunction &c.; or, if that cannot be done, it prays for an account of the partnership debts, and that the real estate may be charged with the amount; and for further relief.

The answers admitted the partnership; denied the contract of sale to Hoxie, and part-performance; and asserted that the conveyance to the defendants, the Carrs, was *bonâ fide*, and without notice; and that the real estate so sold was not partnership property; but, though paid for out of the partnership funds, was purchased and held by the partners as tenants in common, and not otherwise. The owners also admit the possession by Hoxie, but insist that it was by wrong, and not by contract. The answer of Reynolds also asserted, that Hoxie, in December, 1827, (before the filing of his bill) had mortgaged to certain persons (Hopkins, Arnold, and Briggs) the half of the premises asserted to be bought of him, whereby Hoxie was now disabled to perform the contract set up by him. Other matters not now material to be mentioned occurred in the answer of one of the defendants, Nichols.

By a supplementary answer, the defendants further alleged, that since the commencement of the suit and the filing of the answers, viz. in July, 1830, Hoxie had executed a conveyance to one A. Hopkins of all the right, title, interest, and claim, which he had in the premises in the Bill mentioned; and also, that the sheriff's sales of two of the lots of the real estate in the Bill mentioned, had been made

under executions against Hoxie. The Bill, so far as it respects Amos Reynolds, to whom one lot of the real estate in controversy was conveyed, was dismissed, since he has never been made a party by the service of any process upon him.

The general replication having been filed, and evidence taken, the cause came on to be argued upon the merits; and at the argument the following points were presented for the consideration of the Court.

First, whether it was competent for the plaintiff to maintain his bill after the mortgage made by him as stated in the original answers; and if it was, whether the conveyances, *pendente lite*, do not abate the suit.

Secondly, whether the parol contract by Reynolds with Hoxie for a sale, was sufficiently established in point of fact; and if so, whether, in point of law, the party under the circumstances was entitled to a decree for a specific performance.

Thirdly, whether the real estate would, under all the circumstances, be deemed partnership property, since the conveyances thereof were to the partners, as tenants in common; and if it was to be deemed partnership property, whether the plaintiff was entitled to any relief against the present defendants, who were purchasers.

Richard W. Greene and *J. Whipple*, for the plaintiff, and *J. L. Tillinghast* and *N. Searle*, for the defendants.

Story J. This cause has been most fully and elaborately argued upon all the points, and, since he is now no more, I may be permitted to say (what I should feel compelled to suppress in regard to the living) by one of my brethren,[1] whose loss we all deplore, with the consummate skill and profound learning, which always distinguished him.

[1] Mr. Searle is here alluded to by the Court.

As to the first question, I think, that the objection is well founded in principle, though not to the extent of the line of the argument. It is impossible, that a decree can be made in favor of the plaintiff to bind the mortgagees under the conveyance made before the bill filed, unless they are made parties. They have an interest, which cannot be overlooked by the Court, not wholly displacing that of the plaintiff, who, as mortgager, still retains an interest, but concurrent with it. It would be hard upon the defendants to compel them to go on to a decree, which, whether in favor of or against them, would still not be binding on the mortgagees. The latter, in every possible aspect of the case, have an interest in the matter of the bill, whether it be viewed as a bill for a specific performance, or a bill for a settlement of the partnership accounts, and a charge upon the real estate. Suppose there should be a decree charging the estate, as partnership property, with the partnership debts, how could the Court proceed to decree a sale to satisfy those debts, unless the mortgagees were made parties? The general rule, that all persons in interest must be made parties before a decree, is clearly applicable to the present case. But the omission of such parties is no necessary cause of abatement of the suit. That can arise only from matters subsequent to the bill. It may be ground, at the hearing, for a dismission of the bill without prejudice for want of proper parties, or for an order, that the bill shall stand over to make new parties, with leave to file a supplemental bill.[1]

As to the conveyance of the plaintiff, as well as the

[1] See Cooper, Equity Plead. ch. 1, § 4, pp. 63, 64, 73, 74, 75; Id. ch. 3, § 4, p. 214; *Goodwin* v. *Goodwin*, 3 Atk. R. 370; *Whitcomb* v. *Minchin*, 5 Madd. R. 91; *Foster* v. *Deacon*, 6 Madd. R. 59; *Bishop of Winchester* v. *Beaver*, 3 Ves. R. 314.

sheriff's deeds executed *pendente lite*, if they had disposed of all the rights of the plaintiff, there would certainly have been an end to his bill for a total defect of merits; for it is very clear, that no party can stand before the Court for a decree, who has no farther interest in the suit, either formal or real.[1] And where the interests of new parties intervene, *pendente lite*, having derivative titles under the plaintiff, there the suit may abate or become defective;[2] though it would, or might be different in the case of derivative titles under the defendant, *pendente lite*.[3] But the nature of an abatement in Equity seems to have been misunderstood at the argument. It is not, necessarily, a destruction of the suit, like an abatement at law, where a judgment, *quod cassetur*, is entered. It is merely an interruption to the suit, suspending its progress, until the new parties are brought before the Court; and if this is not done at a proper time, the Court will dismiss the suit.[4] But in any case of a purchase, or transfer of interest, *pendente lite*, the proper parties may be brought before the Court.[5] So that the question is brought to this, whether the present cause shall stand over for the purpose of

[1] Cooper, Eq. Plead. ch. 3, § 2, p. 166; Id. § 3, p. 196; Id. § 4, pp. 210, 211, 212. *Harris* v. *Pollard*, 3 P. Wms. 348. *Benfield* v. *Solomons*, 9 Ves. R. 76.

[2] Cooper, Eq. Plead. ch. 1, § 4, pp. 63, 64, 76, 77. 1 Cooke's Bank. Laws, ch. 14, § 3, p. 558, (4th edition.) *Williams* v. *Kinder*, 4 Ves. R. 387.

[3] *Bishop of Winchester* v. *Paine*, 11 Ves. R. 194. *Metcalfe* v. *Pulverloft*, 2 Ves. & B. R. 199.

[4] Cooper, Eq. Plead. ch. 1, § 4, pp. 63, 64, 74–77. *Brown* v. *Higden*, 1 Atk. R. 291. *Williams* v. *Kinder*, 4 Ves. R. 387. 1 Hovenden Suppl. p. 344, note to case 4 Ves. R. 387. *Anon.* 1 Atk. R. 89. Ibid. 263, and note of Sanders.

[5] Cooper, Eq. Plead., ch. 1, § 4, pp. 76, 77. *Merewether* v. *Melish*, 13 Ves. R. 161.

allowing a supplemental bill to be filed by or against the purchasers. If the plaintiff has any interest remaining in the suit, or is a proper party in Equity to give effect to any decree in the premises, affecting the purchasers, I am clearly of opinion, that this should be done to save expense and further litigation. And upon looking at the bill, I do not well see, how it can be doubted, that the plaintiff is a necessary party, since he has a residuary interest in settling the partnership concerns under either aspect of the bill. So far as the bill goes for a specific performance, the title of the purchasers of the real estate is, or may be materially concerned; for it may be made valid, or otherwise, at least as to some of the purchasers, according to the event of the suit. And, so far as it regards the other point, of the real estate being subject to partnership debts, they are all interested in the ultimate settlement of the accounts, and the ascertainment of the amount of the charges, if any, of the partnership debts on the real estate. How is an account to be taken, unless both partners are brought before the Court? And how can the plaintiff make good his conveyance to the purchasers under him, unless he can procure a decree for a specific performance, or some other equivalent relief? I think, therefore, he is a proper and a necessary party in the future progress of the cause.

But, as an expression of opinion on the other points of the cause, or at least on one of them, may save much future litigation, and as they have been fully argued, I purpose to consider, in the next place, the point last argued; and that is, whether the real estate is to be deemed partnership property; and if it is, whether it is chargeable in the hands of the defendants, who are purchasers, with the partnership debts.

It is certainly matter of regret, that the bill intending to raise these questions is not framed with entire exactness or

precision. The bill does not pointedly allege, that the real estate in controversy was purchased with the company funds for the company, and for their use, and on their account. The allegation is much more loose and inartificial. It states, that "the aforesaid lots of land and other property constituted the bulk of the property of said company; that the same was purchased and paid for principally by the joint funds of the company," (not saying exclusively for the company's use or on their account,) "occupied, used, and improved," (that is, in point of fact, and subsequently, occupied, used, and improved) "for the benefit of the company, and not for the sole and individual benefit of either of said partners;" all of which statements may be true, and yet the property not have been purchased on the company's account, as company property. Then, again, as to the charge against the purchasers, (the Carrs,) it is not alleged, that they, at the time of their purchase, had notice, that the real estate was company property, liable, as such, to be charged with the company debts; but the allegations on this head mainly point to notice of the contract of sale, and its incidents. So that, in both respects, there is a defectiveness of allegation, which requires amendment, (though the charges may be met in their broadest sense and inferences, by the answers,) before the Court can properly make a decree.

Some things may in the present discussion be assumed as settled, because, both upon principle and authority, they may now be treated as reasonably free from doubt. In the first place, property purchased with partnership funds does not of necessity become partnership property, if that is not the intention of the parties; at least, in all cases steering wide of fraud and breach of trust.[1] One partner may cer-

[1] See Ex parte *Emly*, 1 Rose Bank. Cas. 64.

tainly withdraw a part of the partnership funds for a separate purchase on his own account; and all may join in a purchase of real estate, for purposes wholly independent of the partnership, intending to hold their shares severally on their individual account. And the fact, under such circumstances, that the payment is made from the partnership funds, will not change the nature or operation of the purchase. It will take effect, as the parties intend.[1] But the circumstance, that the payment has been made out of the partnership funds, especially if the property purchased be necessary for the ordinary operations of the partnership business, and be actually so employed, will afford a very cogent presumption, that it was intended to be held as partnership property; and in the absence of all countervailing circumstances, it will be absolutely decisive.[2] We shall presently see the application of this doctrine to the facts of the case before the Court, and how far it is modified by the statute law of Rhode Island.

In the next place, upon a dissolution of partnership, each partner has a lien upon the partnership effects, as well for his indemnity against the joint debts, as for his proportion of the surplus.[3] But the creditors of the partnership, as such, have no lien upon the partnership effects for their debts. Their equity has been truly said to be the equity of the partners, and is to be worked out through the rights of the latter. The credi-

[1] See Gow on Part. ch. 2, § 1. Id. ch. 5, § 2. *Smith* v. *Smith*, 5 Ves. R. 189.

[2] See Gow on Part. ch. 2, § 1, pp. 48–50. Id. ch. 5, § 2, p. 286, &c. *Thornton* v. *Dixon*, 3 Bro. Ch. R. 199. *Crawshay* v. *Maule*, 1 Swanst. R. 508, 521. *Smith* v. *Smith*, 5 Ves. R. 189. *Forster* v. *Hale*, 3 Ves. R. 696. *S. C.* 5 Ves. 308. *Featherstonehaugh* v. *Fenwick*, 17 Ves. R. 298. Montague on Part. p. 97, note. *Mc Dermot* v. *Lawrence*, 7 Serg. & R. 438.

[3] Gow on Part. ch. 5, § 3, p. 333. *Harvey* v. *Crickett*, 5 M. & Selw. 336. Ex parte *Rowlandson*, 2 Ves. & B. R. 172.

tors, therefore, are not necessary or proper parties generally in a bill between parties to wind up the partnership concerns; but they may, nevertheless, have indirectly the benefit of the proceedings under the bill, since a sale of the partnership effects, and a payment to them is the ordinary result of the decree. This was strongly laid down by Lord *Eldon* in Ex parte *Ruffin*, (6 Ves. R. 116,) where his Lordship said, that joint creditors had no lien whatsoever upon the partnership effects. They had a power of suing, and, by process, of creating a demand, that would directly attach upon the partnership effects. But they had no lien upon, or interest in them, in point of Law or Equity. But, when the partnership is dissolved, the partners have a right to have the business wound up; and, to wind it up, it is indispensable, that the debts should be paid, and the surplus be distributed in proportion to the different interests. In all such cases, the equity is not the equity of the joint creditors, but that of the partners with regard to each other, which operates to the payment of the partnership debts. The same doctrine was acted upon in Ex parte *Williams*, (11 Ves. 3,) Ex parte *Kendall*, (17 Ves. 514,) and Ex parte *Rowlandson*, (2 Ves. & B. 172;) and indeed is too firmly established to admit of a doubt.

In cases, where the real estate is purchased for partnership purposes, and on partnership account, it is wholly immaterial, in the view of a Court of Equity, in whose name or names the purchase is made, whether of one partner or all; whether in the name of a stranger, or of one of the firm. In either case, let the legal title be vested in whom it may, it is in Equity deemed partnership property, and the partners are the *cestuis que trust*. A Court of Law may, nay, must view it, in general, only according to the legal title. And if the legal title is vested in one partner, a *bonâ fide* purchaser from him of the real estate, having no notice, either express or constructive, of its being partnership property, will be entitled to hold it

free from any partnership claim. But if the purchaser has such notice, he is clearly bound by the trust, and takes the property *cum onere*, like every other purchaser of a trust estate.[1]

A question often arises, whether real estate, purchased for a partnership, is to be deemed for all purposes personal estate, like other effects. That it is so, as to the payment of the partnership debts, and adjustment of partnership rights, and winding up the partnership concerns, is clear, at least in the view of a Court of Equity.[2] But whether it becomes personal estate as between the executor or administrator of a deceased partner and his heir or devisee, is quite a different question, upon which learned judges have entertained opposite opinions. The whole doctrine, as between such claimants, must turn upon the presumed intention of the deceased partner; whether, by leaving it in the state of being real property, he meant, as between his personal representatives and his heirs and devisees, that it should retain its true and original character; or whether, having appropriated it as partnership property, it should assume the artificial character belonging to the other personal funds of the firm. In *Thornton* v. *Dixon*, (3 Bro. Ch. R. 199,) which was a question between the heirs and distributees, Lord *Thurlow* said, that he had always understood, that where partners bought land for the purpose of a partnership concern, it was to be considered as a part of the partnership funds, and consequently distributable as personal estate. But upon the cause coming on again, his Lordship held, that the nature of the agreement between the partners in that particular case was not sufficient

[1] See *Ford* v. *Heron*, 4 Munf. R. 316. *Dermot* v. *Laurence*, 7 Serg. & Rawle, 438.

[2] *Ripley* v. *Waterworth*, 7 Ves. R. 424, 434.

to vary the nature of the property; and, therefore, that after the dissolution the property would result according to its respective nature, the real as real, and the personal as personal estate. That doctrine was followed by Sir William *Grant*, Master of the Rolls, in *Bell* v. *Phyn*, (7 Ves. 425,) and *Balmain* v. *Shore*, (9 Ves. 500.) But it has been repeatedly denied by Lord *Eldon*, who has held the opposite doctrine, that real estate purchased on the partnership account ought, on the death of one of the partners, to be held to be personal estate.[1] In *Coles* v. *Coles*, (15 John. R. 159,) the Court seem to have adopted the doctrine of Lord *Thurlow*, though that case might have been disposed of upon its own peculiar circumstances, without any absolute expression of such an opinion. In *McDermot* v. *Lawrence*, (7 Serg. & Rawle, 438,) the Court held, that real estate used by the partnership for partnership purposes, but the conveyance being to them as *tenants in common* in fee, was, as between the creditors of the partnership and a mortgagee, without notice from one of the partners, to be deemed real estate, and liable, in the first instance, to the mortgagee's debt. The reasoning of the Court admits, by a natural implication, (though not necessarily,) that if the property had been purchased out of the partnership funds on account of the partnership, and the mortgagee had had notice, the decision might have been different. The case of *Fade* v. *Hexon*, (4 Munf. R. 316,) is to the same effect as *McDermot* v. *Lawrence*. But *Edgar* v. *Donally*, (2 Munf. R. 387,) admits, that notice would have varied the result as to the morgagee. Mr. Chancellor *Kent*, in his learned Commentaries, adopts the doctrine of

[1] *Townsend* v. *Devaynes*, Montague Part., in notes, p. 97. *Crawshay* v. *Maule*, 1 Swanst. R. 508, 523, 527. *Leckrig* v. *Davies*, 2 Dow. R. 242.

these latter cases, admitting, that notice to the mortgagee would have affected him with a trust for the partnership.[1] The case of *Goodwin* v. *Richardson*, (11 Mass. R. 469,) is much more difficult to dispose of upon the principles of any other case, decided either in England or America on this subject. In that case there was a mortgage to two partners for a partnership debt, and a foreclosure; and then one of the partners died; and the question was, whether the real estate after such foreclosure remained partnership property. The Court seem to have held, that it did not so remain, but was by the foreclosure vested in the partners as tenants in common; and on the death of the partner was, as to his moiety, to be treated as his separate estate. It is, however, material to state, that the sole question submitted upon the statement of facts agreed by the parties was, whether the estate, after the death of the partner, would be deemed a joint tenancy, (as mortgagees are held in Massachusetts to be joint tenants, notwithstanding the Statute of 1785, ch. 62,[2]) or whether the foreclosure made them tenants in common. The latter was the opinion of the Court. Now this was a decision upon a mere question at law upon the legal title. But in a Court of Equity it is impossible, (I think,) that the property should not have been deemed partnership property, and distributable accordingly among creditors, whether the partners held it at law in joint tenancy, or as tenants in common. The cases already cited are full to the point, and they have the unhesitating approbation of Mr. Chancellor *Kent*.[3] So that the case in Massachusetts turns upon a mere point of local law,

[1] 3 Kent Comm. 14, 15, 16. See also Hovenden's Suppl. to Vesey Jr. R. Note to case of *Ripley* v. *Waterworth*.

[2] *Appleton* v. *Boyd*, 7 Mass. R. 131. And see, on this subject, *Randall* v. *Phillips*, 3 Mason R. 378.

[3] 3 Kent Comm. 14, 15, 16.

under a local statute, and does not dispose of the equities between the parties resulting from general principles.

The question, however, in the present case is not, whether real estate, when it is partnership property, becomes, to all intents and purposes, in cases of intestacy and wills, personalty; but whether it is so treated in Equity, as between the partners themselves and the creditors of the partnership. It seems, (as has been already stated,) to be the established doctrine of Courts of Equity, that it is to be treated as personalty, as between the partners and their creditors, in whosoever name it may stand on the face of the conveyances.

It has been supposed at the argument, that the circumstance, that a conveyance is taken to the partners as tenants in common in fee, varies or ought to vary the application of the general doctrine, and that, at all events, under such circumstances it is inapplicable to titles of real estate in Rhode Island. One ground relied on is, that where on the face of the conveyance it is a tenancy in common, parol evidence, that it is partnership property, contradicts and controls the legal operation of the words of the deed. But this argument is not well founded. The evidence is not introduced to establish any fact inconsistent with the legal operation of the words of the deed; but merely to engraft a trust upon the legal estate. Indeed, partners in a legal sense are either tenants in common of the partnership property, or joint tenants without the benefit of survivorship, which is the nearest possible approach to a tenancy in common. The circumstance, that the conveyance is in the names of the partners, as tenants in common, may afford some presumption, in the absence of countervailing presumptions, that the conveyance is not designed to be on partnership account; but, *per se*, it is very slight, and never decisive. In some of the cases already

cited, the conveyance was to the partners, as tenants in common ;[1] but that circumstance was not relied on as conclusive.

Then again, it is said, that the statute of conveyances and the statute of frauds of Rhode Island contain no exception in favor of resulting trusts, (as the statute of frauds in England, and the corresponding statute of Massachusetts do,) and, therefore, such a trust cannot be varied by operation of law in favor of the partnership. But it does not appear to me, that the statutes of Rhode Island vary the common rule; for they respect trusts created by the acts of the parties, and not trusts created by operation of law.[2] My impression is, that the exception in the statute of frauds, in England and Massachusetts, as to resulting trusts, has been deemed merely affirmative of the general law, and not as creating a saving of resulting trusts, which would otherwise have been cut off, unless in writing. But it is the less necessary to decide this point absolutely on this naked ground; for if the property were purchased with partnership funds and for partnership purposes, and thus it became an executed contract between the partners, it would be a fraud upon the partnership, afterwards to appropriate it to the private use of either of the partners, without the assent of the others.[3] And purchasers claiming under him with notice would be in the same predicament as the partners so misapplying the funds. No one will doubt, that a partner cannot shelter himself, in a Court of Equity, from responsibility for a fraud, under cover of a statute to prevent frauds. That would be, (as has been often said,)

[1] *Balmain* v. *Shore*, 9 Ves. R. 500. *Ford* v. *Heron*, 4 Munf. R. 316. *McDermot* v. *Lawrence*, 7 Serg. & R. 438.

[2] Digest of Rhode Island Laws, 1822, pp. 202, 366. See 2 Mason R. 203; 3 Mason R. 361.

[3] See *Forster* v. *Hale*, 3 Ves. R. 696. *S. C.* 5 Ves. R. 308, 314.

to convert the very statute into an instrument of fraud. Whether the doctrine on this head has not been carried too far by Courts of Equity, is not now matter open for discussion; for the authorities are exceedingly cogent and pointed in its application.

I agree to the doctrine asserted at the bar, that, to create a resulting trust, there must be an original agreement creating the trust at the time of the purchase, or at least at the time when the contract for the purchase takes effect, and is executed by an appropriation of it as partnership property. And I farther agree, that, as a general rule, a resulting trust cannot arise in contradiction to the terms of the deed.[1] But it does not appear to me, that the resulting trust, asserted in the present case, is liable to any exception on either of these grounds. It neither contradicts the deed, nor has a commencement posterior to the partnership purchase and appropriation.

The question, then, is, whether there is sufficient evidence to establish, that the real estate in controversy in the present case is property belonging to the partnership, I do not say, at law, but in equity.

In the first place, it is admitted, that the real estate was principally, if not altogether, purchased with the partnership funds. That is of itself a very strong circumstance; and, in the absence of all controlling circumstances, would be ordinarily decisive, to the extent of the partnership investment. In the next place, it was property necessary for the business of the partnership, and was appropriated to the use and benefit of it, during the whole period of its existence. The cotton mill, and other factory establishments necessary for the business, were erected on it. I do not say, that the whole of

[1] See 2 Mason R. 203. 3 Mason R. 347. 3 Kent Comm. 14 – 16.

the real estate was thus used; but a great portion of it, and that which was of chief value, (to wit, the lot on which the factory was erected,) was thus used, and indeed was indispensable for the manufacture of cotton. In the next place, recurring to the original articles of partnership, of January 8th, 1814, (which included four other persons, who have since withdrawn from it,) it is stipulated, that a capital stock should be raised of six thousand dollars. The real estate, (or the principal part,) had been antecedently, (in November, 1813,) purchased in the name of three of the partners for $1600, and a conveyance made to them "as tenants in common in equal proportion, their heirs and assigns for ever." The whole stock was divided into tenths, of which the new partners took four tenths, and received from the other three, on the same day, a conveyance of their shares accordingly in a three acre lot, parcel of the premises, on which stands the principal factory and improvements; and the conveyance stated, "the same being for the use of a mill or mills for spinning cotton." The articles of partnership further provide, that "the books shall be kept, and the business carried on, in the name of the original proprietor; this capital stock shall be together, as joint property [of] tenants in common; and no dividend struck, until there be a surplusage of money, thought by the company unnecessary to be kept any longer." The language is very inartificial and loose; but it is apparent that the intention was, that the capital stock so raised should be exclusively held for partnership purposes, the partners all being tenants in common thereof, the business being carried on in the name of the original proprietor, that is, (I suppose,) of the original partners named in the deed. It seems, that the factory, mill-dam, and other improvements were erected after the purchase out of the partnership funds.

In the next place, there is a total absence of any proof in

the partnership books of any charges for the real estate against the several partners, as upon a purchase made on their separate and individual accounts. Under such circumstances it seems difficult to resist the conclusion, that the real estate was contemplated by the partners, as a part of their capital stock; and, as such, was governed by the express clause of the articles respecting the disposal of the joint stock.

Against these circumstances there does not seem to be any thing on the other side of very great weight and significancy. It is true, that all the answers assert, that the property, though purchased with partnership funds, was purchased for the partners, as tenants in common. But for this allegation the defendants, who are purchasers, do not pretend to rely on any facts within their own knowledge; but mainly on the purport of the language of the conveyance, and upon information from other collateral sources. Reynolds, (the partner,) does indeed positively assert, that the real estate was purchased and held by the plaintiff and himself, "as tenants in common, but not as copartners; and that the same never constituted any part of the copartnership stock." And he adds, "that the said lands were paid for out of the company property, each tenant in common being charged by the company with the amount paid for his half of said lands." But no such charge appears, (so far as the Court has any means of knowledge,) in the company books; and therefore the answer is not in this respect sufficiently maintained by proof. The circumstance, that the deeds of conveyance are to the partners, as tenants in common, though certainly of some weight, is not sufficient to overturn the strong presumptions the other way.

There are yet some collateral ciecumstances, which give great strength and cogency to the presumption, that the three acre lot, (on which the factory was erected,) was,

from the time of the formation of the partnership in January, 1814, treated by all the partners as partnership property. In the deed of H. R. Greene, (one of the partners,) to the plaintiff and the defendant, Reynolds, of his one third of the joint purchase, he expressly bounds the thirty-seven acre lot on the three acre lot, as an abuttal. The language is, "until it comes to the lot belonging to the West Greenwich Manufacturing Company," meaning the three acre lot. And again, in the deed of the defendant, Reynolds, to the other defendants, the Carrs, conveying his share of the whole forty acres, the description concludes thus, "containing by estimation forty acres, be the same more or less, together with one undivided half part of one cotton factory, machinery therein, dams, flumes, trenches, waters, and water privileges, and apparatus to said factory belonging, with three dwelling-houses and other buildings thereon standing, *being the same establishment heretofore owned by the West Greenwich Manufacturing Company.*" This language applies, indeed, to the whole forty acres; and it is still stronger as to the three acre lot, from its minute enumeration of the buildings and privileges thereon.

Upon the whole I cannot say, that I see any solid ground of doubt, that the three acre lot was, from the very commencement of the partnership, held and used by all the partners, and understood by them to be held and used, as company property, and part of the capital stock thereof. The evidence is less stringent as to the remaining thirty-seven acre lot, and slighter still as to the other lot, on which the Picker-house stands. As to these last lots, I perceive no objection to refer it to a master to consider and report upon the facts, whether they were partnership property, or not, if either party should desire the inquiry to be made.

The next question is, whether this real estate, so held on

partnership account, is chargeable in the hands of the present purchasers with the payment of the partnership debts. That depends, in my judgment, wholly upon the point, whether they had actual or constructive notice at the time of their purchase, that it belonged to the partnership. If they had notice, it is so chargeable; if not, then they are exonerated to the extent of the purchase money already paid by them. I say, to that extent; for clearly, so far as the purchase money has not been paid, that is a substituted fund, chargeable in their hands with the same burdens as the real estate.[1] It is admitted by the answers, that the purchase was made for $1600, of which $200 have since been paid, and a note given for $1400, upon which about $500 have been paid; so that there remain due of the purchase money about $900. No ground is stated, upon which this sum is exempted from a charge for the partnership debts. If this be so, then it is clear, that, if the proper parties are brought before the Court, an account may be taken of the partnership funds, and a decree be had against the purchasers for such an amount as, with reference to the partnership debts, the purchase money is, *ex æquo et bono*, chargeable with.

But the more important question is, whether the purchasers had not notice, actual or constructive, that the real estate was partnership property; for it is not material, whether they had notice of the existence of the partnership debts. They were put upon inquiry of the latter fact, if they had knowledge of the former, and are bound to all the consequences; since they could take only such equity in the estate, as the partner, from whom they purchased, was entitled to.

Now, it is not an insignificant circumstance, that one of the purchasers, (Nathan Carr,) is the son-in-law of the partner,

[1] See *Potter* v. *Gardner*, 12 Wheaton R. 498. *S. C.* 5 Peters R. 718.

Reynolds, and lives in the immediate neighbourhood of the factory; and that the other purchaser, (Jesse Carr,) is the father of Nathan Carr. In the next place, it is admitted, by their answers, that the partnership was in fact, though not formally, dissolved before the purchase, and that the plaintiff (Hoxie) in March preceding the purchase, "took exclusive possession of the company's property, and excluded Reynolds from the same, and from the mill, in which he and his family had then before labored, and has ever since retained possession of the same against the consent of said Reynolds." And in regard to debts due by the partnership, their answers farther state, that they do not know the amount of the company property or debts; but that they have understood and believe, that, if the company concerns were justly settled, the company property would be more than sufficient to pay the company debts. So that they do not assert their ignorance, that there were at the time of their purchase any debts due by the partnership. Under such circumstances the fact, that one partner was in the exclusive possession, holding out the other, was of itself calculated to awaken suspicion, and some inquiry on the part of any diligent and watchful purchaser. In the next place, it is most material, that the very title deed, under which they claim, does (as has been already stated) refer to the estate as "being the same establishment *heretofore owned* by West Greenwich Manufacturing Company." If owned by them, the purchasers must or ought to have known, that without a joint conveyance, or release, from all the partners, no absolute title could be acquired by their grantor, Reynolds. They were put upon inquiry to ascertain, whether any such conveyance or release had been made; and they cannot now set up their ignorance of law to excuse their want of diligence. Upon the slightest inquiry they could not but have found out, that the company was

greatly in debt; and that Hoxie claimed a right in the property, not merely as partner, but under a contract of purchase previously made by him with Reynolds, for the purpose of liquidating the company debts. In the next place, I think it sufficiently appears from the testimony, and other evidence in the case, that the partnership was largely indebted at the time of the dissolution; and that it had been notoriously straitened, if not embarrassed, in its circumstances before the purchase by the Carrs. And it is incredible, that the fact should not have come to their knowledge, considering their local residence and connexion with the parties.

I do not advert to the testimony respecting the supposed contract between the plaintiff (Hoxie) and the defendant (Reynolds); though if notice of that contract could be brought home to the Carrs, it would be conclusive upon the very point now under consideration. I mean, in relation to the embarrassments of the company, and the necessity of applying the real estate, as an appropriate fund, to discharge the partnership debts.

But in the view, which I have taken of this case, it is wholly unnecessary to go into the consideration of the matter of the contract; since, with reference to the other point of partnership, there seems a clear ground of Equity, upon which the Court ought to retain the bill, and, if the proper parties can be brought before it, to proceed to farther inquiries, and a farther decree.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1832, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

SHEFFIELD REED AND OTHERS, APPELLANTS AND RESPONDENTS,

v.

WILLIAM CANFIELD, APPELLEE AND LIBELLANT.

A seaman, whose feet are frozen while in the ship's boat in the service of the ship, before he is discharged from the ship on the return voyage, at the home port, is entitled to be cured at the ship's expense; and it is a charge on the ship.

Quære, How it would be in a case of extraordinary service to the ship, in the nature of a salvage service. Would it be a general average?

THIS was the case of a libel *in personam*, filed against the owners of the ship Albion, of New Bedford, belonging to the original respondents, (now appellants,) for compensation for expenses incurred in curing the libellant, who was a seaman on board of the ship, and severely injured, as is alleged, while in the service of the ship. The facts are, that the Albion was engaged in the whale fishery, and, being on her return from a voyage in the Pacific, came to anchor on the

17th of February, 1831, nearly opposite the light-house on Clarke's Point, in New Bedford, the port of her destination. The master soon afterwards landed at Fairhaven, and gave permission for one of the mates also to go on shore. Both of the mates expressed a desire to avail themselves of this permission on the return of the boat from landing the master. They finally both concluded to go ashore,[1] taking with them a boat's crew who were volunteers for the occasion, and on whom they could rely with confidence, that they would return on board of the ship that evening in proper season. Among the boat's crew on this occasion was the libellant, and one Winslow, a boat-steerer. They landed at New Bedford between seven and eight o'clock in the evening; and the boat's crew, after taking supper at the house of some of Winslow's friends, returned at a later hour (the precise time is a matter of considerable doubt) to the boat, and departed for the ship. Soon after they had left the shore, there was a great change in the wind and weather; the cold became intense; they were surrounded and entangled in drifting ice; and were unable to reach the ship. After many unavailing efforts for this purpose they were driven out into the bay, and remained there enclosed in ice, and suffering extremely from the cold, until the following night, (18th of February,) about midnight, when they were relieved from the shore. The libellant was the greatest sufferer; and his feet were so severely frozen, that an amputation of his toes became necessary; and he has ever since been a cripple, and for more than a year afterwards was under the care of a physician, requiring constant medical aid, diet, nursing, and other assistance. It is for the expenses so incurred, that the present libel was brought.

[1] This was pronounced by the Court, a most unwarrantable departure from their duty.

Fletcher and *Simmons* for respondents; *Dunlap*, District Attorney, for libellant.

STORY J. This libel presents a case somewhat novel in the annals of our maritime jurisprudence. Upon the more general question suggested upon the posture of the facts, I have no difficulty. I am clearly of opinion, that a seaman, who is taken sick, or is injured, or disabled in the service of the ship, without any fault on his own part, is by the maritime law entitled to be healed at the expense of the ship. I do not go over the authorities on this subject. They will be found in some measure collected in the opinion delivered in *Harden* v. *Gordon*, (2 Mason R. 541,) to which I deliberately adhere. So far as any Act of Congress has changed or modified the principle of the maritime law, it is to be deemed, *pro tanto*, repealed; so far as it stands unaffected by any such legislation, it is to be followed out to all its just results.

Various objections to the claim have been made on behalf of the respondents. It has been said, that there is no case of any claim in the Admiralty for compensation after the voyage has been performed, and the party has been discharged from the ship; and in the present case, the voyage terminated, and the party was lawfully discharged in a day or two after the accident. But upon this point it is unnecessary to say more, than that, if the principle of the maritime law extends to cases circumstanced like the present, the Admiralty is perfectly competent to administer a suitable remedy; since its jurisdiction attached to it as a right, while the party was in the maritime service; and the extent of the compensation is but an incident to the possession of the principal claim. It is but an ascertainment of damages, flowing from a claim of admiralty and maritime jurisdiction.

Another objection is, that the maritime law applies only to sickness, and accidents, and injuries occurring in the ship's

service during the voyage abroad, and not, when she is in the home port, either at the commencement or termination of her voyage. But I know of no such qualification engrafted upon the rule of the maritime law. It embraces all sickness, and all injuries, sustained in the service of the ship, and while the party constitutes one of her crew, without in the slightest manner alluding to any difference between their occurring in a home or in a foreign port, upon the ocean, or upon tide-waters. Lord *Tenterden*, in his excellent Treatise on Shipping, lays it down generally, "That by the ancient marine ordinances, if a mariner falls sick *during the voyage*, or is hurt in the performance of his duty, he is to be cured at the expense of the ship; but not, if he receives an injury in the pursuit of his own private concerns." And he is fully borne out in this statement by the language of the ordinances cited by him on this occasion.[1] Indeed, the 18th Article of the Laws of Wisbuy expressly declares, "that a mariner, being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship." The commercial law of France furnishes an equally liberal rule, both in its ancient and modern codes.[2] The voyage of the ship must, so far as the seamen are concerned, be deemed to commence, when they are to perform service on board, and to terminate, when they are discharged from farther service. The title to be cured at the expense of the ship is coextensive with the service in the ship. The seaman is to be cured for injuries and sickness

[1] See Laws of Oleron, art. 6; of Wisbuy, art. 18; of the Hanse Towns, art. 39; 2 Peters Adm. R., Appendix, p. xiv. Id. lxxiv. Id. cv.

[2] See 1 Valin Comm. Lib. 3, tit. 4, art. 11, p. 72. Code de Commerce, art. 262, 263. (2 Peters Adm. R., Appendix, p. xxxiii. art. 11.) Cleirac, Us et Coutumes de la Mer., p. 31. Jugemens d'Oleron, art. 6 & 7, p. 18.

occurring, while he is in the ship's service. It is the benefit from the service, which constitutes the ground-work of the claim. And I am wholly unable to perceive any principle, upon which a distinction can be maintained between a service in a foreign and a home port.

It has been suggested, that a seaman at home cannot be entitled to any claim against the owners of the ship for injuries received in the ship's service, any more than a mechanic or manufacturer at home for like injuries in the service of his employer. If the maritime law were the same in all respects with the common law, and if the rights and duties of seamen were measured in the same manner, as those of mechanics and manufacturers at home, doubtless the cases would furnish a strong analogy. But the truth is, that the maritime law furnishes entirely different doctrines upon this, as well as many other subjects, from the common law. Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea-service, which do not belong to home pursuits. The law of the ocean may be said in some sort to be a universal law, gathering up and binding together what is deemed most useful for the general intercourse, and navigation, and trade of all nations. Who ever heard of salvage being allowed for saving property on land? Who ever heard of any civilized nation, which denied it for salvage services at sea, or on the sea-coast? It is impossible, therefore, with any degree of security, to reason from the doctrines of the mere municipal code in relation to purely home pursuits, to those

more enlarged principles, which guide and control the administration of the maritime law.

It is said, that the Acts of Congress respecting hospital money, and the relief of sick and disabled seamen, provide suitable means for the relief of seamen in the home ports; and therefore may be deemed to supersede the maritime law, even if it reaches to relief in cases like the present. But it appears to me, that they are rather to be deemed auxiliary to the maritime law. They reach cases, where the maritime law gives no relief; and are far different in their scope and operation from mere cases of injuries and sickness, while in the ship's service. They are founded upon the great national policy of providing means for the relief of seamen, who are sick and disabled, by withdrawing a small fund, from time to time, from their maritime earnings. They compel seamen, (a most gallant, but improvident class of men,) to contribute somewhat in the day of their prosperity towards their own relief, when sickness and casualties overtake and cripple them. The Act of 1798, ch. 94, (the first of the series,) provides, that the master or owner of every ship or vessel of the United States, arriving from a foreign port into any port of the United States, shall pay to the collector at the rate of twenty cents per month, out of his wages, for every seaman employed on board of the vessel, since she was last entered at any port of the United States. Another section extends the like provision to vessels engaged in the coasting trade. By the same Act the President of the United States is authorized, out of the funds so raised, to provide for the temporary relief and maintenance of sick and disabled seamen in the hospitals, or other institutions now established in the ports of the United States; or in ports, where no such institutions exist, in such other manner as he shall direct; provided that the moneys collected in any one district shall be expended within the

same. And the surplus is reserved as a fund for the erection of hospitals for the accommodation of sick and disabled seamen. I need not dwell upon the subsequent amendatory Acts,[1] because they have not changed the objects of the charity. These still remain, "the relief and maintenance of sick and disabled seamen," without the slightest reference to the time, the place, or the manner, of their sickness or disability, whether in port, or on the ocean; whether in the service of the ship, or otherwise; whether from their own fault, or from inevitable casualty. All seamen are the objects of the bounty, who are sick or disabled. What class of seamen have been practically construed to be seamen within these Acts, it is not now necessary to determine. It seems, that at an early period, (1800,) the government issued instructions, by which all officers of the navy and of the marines, and all seamen and marines in the public service of the United States, (the Acts respecting hospital money being extended to them,) and "all officers and seamen in the merchant service," were admissible into the hospital establishments, unless the disorder, with which they were visited, was contagious or malignant. These instructions have never been altered. It is certainly questionable, whether all seamen whatsoever, (and whalemen and fishermen are seamen in the sense of the marine law,) are not within the scope of the Acts; and if they are, no executive instructions can lawfully narrow them. It seems indeed, that the Acts have been practically construed not to impose upon ships and vessels in the whale and other fisheries the payment of hospital money; and it is most natural, under such circumstances, to presume, that Congress intended the benefit for those, who were to bear the burthen. But on this point I give no opinion; because none is necessary in this case.

[1] Act of 1799, ch. 142; Act of 1802, ch. 51; Act of 1811, ch. 93.

If seamen in the whale fisheries are not entitled to the benefits of the charity, because they do not contribute to the fund, then the argument at the bar, founded upon the supposition, that they may be relieved, falls to the ground. If, on the other hand, they are entitled to the charity, although not contributors to the fund; then it is, because the Acts are founded upon a general policy, applicable to all cases of sickness or disability, without reference to their being in the ship's service; and then they steer wide of the objects of the maritime law. They are auxiliary to, and do not supersede it. In truth, the relief may be required, where there are no funds to be administered, and in cases where the instructions prohibit it. It seems to me, therefore, that the argument from this source does not present any sufficient obstacle to the claim.

It has been asked, if, in a claim of this sort, the expenses of cure are to be paid by the ship, what are the limits of the allowance? May they be extended over years or for life? Are they to be, like the pensions allowed by some of the marine ordinances, in cases of wounds and other injuries, received by seamen in defending the ship from the attacks of pirates? My answer to suggestions of this sort is, that the law embodies, in its very formulary, the limits of the liability. The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party, while in the ship's service; and he is not to receive any compensation, or allowance for the effects of the injury. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses neces-

sarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is, what expenses have been virtually incurred for the cure; not what might, under other circumstances, be incurred. The owner is not to respond for charity actually administered by others, but for expenses. He is not to pay what may remunerate the sufferer for his losses, or what in compassion or humanity he might demand; but what the law has measured out as the limit of justice.

Cases, indeed, may occur, where a seaman may be entitled to a far different compensation, as where he has gone beyond the line of his duty, and saved the ship from impending perils. There, he may be entitled to a more ample compensation, in the nature of a salvage, to indemnify him for any wounds or injuries sustained in this extraordinary service. The case, put by Cleirac and others,[1] of wounds sustained in defending the ship against pirates, may be of this nature. But it then probably falls under the head of a general average, for the benefit of all concerned, or of a salvage service, which entitles the party to a full recompense. That is not the present case; and it may well be left for decision, until it shall arise directly in judgment.

And this leads me to remark, that the present is not a case, where the expenses are to be deemed a general average charge upon all, who are concerned in the voyage. It is strictly a charge upon the ship-owners; and comes out of their earnings, or arises from their proprietary interest in the voyage. Although seamen in whaling voyages are compensated by shares of the proceeds, this compensation is always

[1] See Cleirac, Jugemens d'Oleron, art. 6 and 7, and note by Cleirac. Consolato del Mare, ch. 182, (ch. 137.) 2 Pardessus, Collect. Marit. 152.

treated as in the nature of wages. They are never deemed partners, although they may be said to partake of the profits of the voyage. And the very nature of the service excludes the notion of partnership. It would defeat the very objects of the parties. The apportionment of the proceeds is only a mode of ascertaining their compensation; but the shares are treated as separate, distinct, and independent claims. No one ever supposed, that the seamen in whaling voyages were liable to third persons for the debts of the ship, or the outfits of the owners for the voyage. This doctrine has been long established upon the soundest rules of interpretation of the contract.[1]

The only remaining ground, upon which the claim is resisted is, that the injury was not sustained in the service of the ship, but by the fault of the libellant. And if this be maintained in point of fact, it is certainly a sufficient answer to the claim. The ground is this, that the seamen, although in the ship's service at the time of the accident, were guilty of gross negligence in not returning to the ship at an earlier hour, according to the orders given to them by the mate on giving them leave to quit the boat; and that the accident would have been wholly avoided by a return at an earlier hour. The orders, it is said, were, that they should return in a half-hour; and they did not return until after the lapse of an hour or two. It is not very easy to reconcile the evidence on this point, either as to the nature of the orders, or the time of the return. But some latitude must be allowed, in cases of this nature, in the construction of the orders, whatever may have been the exact terms, in which they

[1] See *Wilkinson* v. *Frazier*, 4 Esp. N. P. 182. *Mair* v. *Glennie*, 4 M. & Selw. 240. *The Frederick*, 5 Rob. R. 8. *Baxter* v. *Redding*, 3 Pick. R. 435, 439. Abbott on Shipp., edition 1829, note, p. 432.

were conveyed. They were probably understood to import no more than, that they must return to the ship at an early and reasonable hour. They could scarcely have been intended to tie up the seamen to the exact limit of a half-hour, without any departure from the *punctum temporis*. There was no pressing emergency leading to the necessity of such a construction of the orders. There was nothing in the then state of the weather, or the admonition of the mate, or the nature of the service, requiring such extraordinary punctuality. If there had been, and it might have been foreseen, that delay would be attended with a great accumulation of dangers, or serious mischiefs to the ship's service, the case might admit of a very different consideration. Suppose the crew had overstayed the time but five minutes, and the accident had occurred, could it be contended, that the owners were exonerated? It would be a most inconvenient and unjustifiable course to tie up the maritime law to such niceties. We must look to the nature of the service, and the general import of the orders, in cases of this sort. The most rigid promptitude may be exacted in some cases; while in others a more indulgent rule may be fairly employed. All that could have been intended in this case is, that the boat should return to the ship in a reasonable time, in the course of the evening. I think the weight of the evidence decidedly is, that she did return in a reasonable time, and not at a very late hour. And I am by no means satisfied, that it is clearly made out in proof, that the boat would not have met with the accident, if her departure had been at an earlier hour.

Besides; the accident occurred, while the libellant and the others of the boat's crew were actually in the ship's service. There is no pretence to say, that in the management of the boat there was any negligence. The neglect, if any, was in the non-compliance with the strict terms of the orders.

They obeyed the orders in returning, but not as promptly as was required. Now, it may be reasonably doubted, if, under such circumstances, any thing short of gross negligence could forfeit, on their part, their ordinary rights. We must here, as in many other cases, not extend our inquiries too far back into independent causes. *Causa proxima, non remota, spectatur*, is the doctrine of the law, founded upon common sense and convenience in the ordinary transactions of human life. The storm here was the immediate cause of the injury, and not, strictly speaking, the fault of the boat's crew. But if such a rule were inapplicable, still, I think, there might be gross negligence, that is, that sort of negligence, which the law denominates *crassa negligentia*, and which would operate somewhat like a fraud upon the owners. Ordinary negligence, consistent with entire good and a sober intention to comply with duty, and, much less, slight negligence, ought not to be visited with so deep a forfeiture. Repentance and a return to duty, even after a fault, are not in the maritime law visited with such extraordinary severity. It is rather the tendency of that law to wink at slight offences, and to punish those only, which are gross and deeply injurious to the ship's service. It does not appear to me, that, in the present case, there was any gross negligence, or any unreasonable and intentional delay on the part of the boat's crew, in wilful disobedience of orders. The case, therefore, is not made out in point of fact, so as to require the application of a forfeiture of the common claim.

Then, again, it is urged, that the claim comes too late, or so late, that it furnishes a strong reason for rejecting it. Certainly this Court is not disposed to entertain old and stale claims. But the delay is here quite consistent with good faith. And, indeed, it is obvious, that it was founded wholly in a mistake of the party's rights. The libellant was igno-

rant, that such a claim was maintainable; and has been prompt enough to bring it forward, since he has been enlightened on the subject. If it had been clear, that this delay had worked any real mischiefs to the respondents, the Court would extremely regret it. But if the libellant's ignorance of the law ought not to avail in his favor, the respondents cannot avail themselves of a like ignorance to escape from their duty. They were bound to know the law, as well as he; and, in a mutual mistake, the law looks to the rights of the parties, and contents itself with measuring out that, without entering upon the more difficult task of adjusting personal equities *in foro conscientiæ*.

I do not understand, that there is any objection to the amount awarded by the District Court, if the principle is right. Being of opinion, that the principle is right, I shall, therefore, affirm the decree. But as the question is new, and the controversy most fairly submitted to the Court, I shall direct, that each party pay his own costs in this Court.

THE SCHOONER EMULOUS AND CARGO, MICHAEL H. SIMPSON, CLAIMANT.

Salvage. What services are to be deemed salvage services.
Principles by which salvage is regulated.
One eighth allowed under the circumstances.

LIBEL for salvage. The District Court, upon the hearing, decreed to the libellants the sum of twelve hundred dollars; the value of the schooner and cargo saved, was ascertained to be five thousand seven hundred and twenty-two dollars and thirty-eight cents. From this decree the claimant appealed to the Circuit Court.

The facts, as they appeared at the trial in the District Court, (and they were not materially changed by the evidence on the appeal,) were as follows. The Emulous, laden with mahogany, logwood, coffee, and hides, on a homeward voyage from ——— to Boston, struck on a reef at Robinson's Hole, (so called,) on Nashaun Island, in the Vineyard Sound, early on Wednesday morning, the 8th of February, 1832, and was so much injured, that she very soon filled with water. Immediate assistance was obtained from the shore by the Captain, and the coffee, hides, provisions, and clothing were landed on that day. Anchors were carried out, and the schooner left at night nearly full of water. The next day was a stormy day, (a snow storm.) The vessel, however, was on that day hove off from the reef by the Captain and his assistants, and left at five o'clock in the afternoon at anchor. She capsized during the night; and on the next morning, (the 10th,) she was found in that situation by the Captain. He had previously made a contract with the owner of the sloop Hero, to tow her into Wood Hole for fifty dollars, or to Edgartown for seventy-five dollars, as the Captain of the Emulous should choose. On finding, however, the vessel capsized, the parties considered that contract at an end. Soon afterwards the Pilot Boat Superior, commanded by Captain Daggett, (the principal libellant,) came to their assistance, and in her then perilous situation, with the consent of the master of the Emulous, she was committed to his charge and superintendence, and he, together with his associates, and the master and the crew of the Hero, undertook to tow the Emulous into the port of Edgartown, which was at the distance of from twenty to twenty-five miles. After sawing off the chain cable, and disengaging the Emulous from her anchor, and securing the latter by a buoy, they proceeded to tow her across the sound to Edgartown, without attempt-

ing to right her. There is a strong current in the Sound, from three to four and a half miles an hour; and, after having towed the schooner a considerable way, she was carried back again a considerable distance by the force of the current. In the course of her towage she struck on a shoal, (the middle shoal,) and there righted. With a good deal of exertion and perseverance, and some considerable risk, during that day and the following night and a part of the next day, they succeeded in bringing her safely into the harbour of Edgartown. The vessel was there repaired, and finally came to Boston, and completed her voyage.

The original libel was filed in behalf of the Masters and Crews of the Superior and Hero; but it was afterwards amended by adding the claims of fourteen other persons, who, it is alleged, were employed in getting the schooner off the rocks and anchoring her, before possession was taken by the Superior and Hero.

At this term the cause was argued by *Dunlap*, District Attorney, for the libellants; and by *Peabody* and *Webster*, for the claimant. The former cited Bee's Admiralty R. 1. 245; 4 Cranch, 347; 4 Rob. R. 1941; 1 Gallis. R. 135; 1 Mason R. 372; 1 Dodson R. 421; 2 Dodson R. 75; 4 Rob. R. 108; 5 Rob. R. 323; 2 Parli. Deb., 1688, p. 191.

The latter cited *The Blaireau*, 2 Cranch R. 240; Bee's Admiralty R. 139, 177; Abbott on Shipp., (4th American edition,) 433, note; Stat. 43, George III.; Jacobsen's Sea Laws, 530, 559, 560; 4 Rob. R. 217; 6 Rob. R. 272.

Story J. This is clearly, in my judgment, a case of meritorious salvage, for which the salvors, and especially the Masters and Crews of the Superior and Hero are entitled to a fair recompense. It is not, as has been suggested, (rather than argued,) at the bar, a case of derelict; for that can arise only, when there has been an abandonment by the master

and crew, without any intention to return to the wrecked property. Here was not only the *animus revertendi*, but the actual presence of the master, at the time when the salvage service was performed.

The Court has been asked upon this occasion to lay down some clear and definite rule, as to what shall be deemed salvage service, and what shall be deemed a mere common contract for labor and services. I take it to be very clear, that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances, which establish, that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum meruerunt*; in either case, it does not alter the nature of the service, as a salvage service, but only fixes the rule, by which the Court is to be governed in awarding the compensation. It is still a salvage contract, and a salvage compensation. It is true, that contracts made for salvage services are not ordinarily held obligatory by the Court of Admiralty upon the persons, whose property is saved, unless the Court can clearly see, that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence, purporting to be founded upon moral, or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract, unjust, oppressive, and exorbitant; that he might turn the price of safety into the price of ruin; that he might

turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings, and disgrace human justice.

The salvors, who, at the request of the Master of the Emulous, assisted in taking out her cargo and getting her afloat, are certainly entitled to a compensation. But their services are of a nature belonging to the lowest grade of salvage, such as may ordinarily be compensated by daily wages. They understood themselves, if we are to believe the testimony of the Master of the Emulous, to enter upon the service for such a compensation; and if they did, they cannot afterwards elect to turn it in a higher grade of service, without any supervening circumstances, changing either the perils or the contract. My judgment is, that a much smaller sum will be an ample remuneration for their services.

In respect to the Masters and Crews of the Superior and Hero, their services commenced exactly where those of the other salvors terminated. The assistance given by them was prompt and cheerful; their labors arduous, and constant, and persevering; and, at times, not without considerable peril to life, and some hazard to their own vessels. The season of the year was that, in which the weather is usually boisterous and variable; and of course the chances of a successful termination of the enterprise, upon which alone they could entitle themselves to salvage, were proportionably more unfavorable. It has been suggested, that a different course of operations might have been better, and less hazardous. The attempt should have been made, (it is said,) to right the vessel, where she lay; and it is hinted, that perhaps a nearer port might have been reached. But it appears to me that, these suggestions ought not to have any weight in the cause. The parties appear to have acted with good faith, and reasonable skill, and sound discretion. The Master himself made no com-

plaint, and the enterprise was completely successful. Under such circumstances, it would be too much for the Court to act upon mere after-thoughts and calculations, when the events are known, and other judgments at a distance from the scene of action have intervened. It is far from being certain, that any attempts to right the Emulous would have been successful. And it is certain, that they must have occasioned delays, if they had been undertaken. Now, at such a season of the year, on such a coast, delay itself is often equivalent to loss. Speed and activity in reaching a port are the means, and the only means of safety. In this very case, if the vessel had remained out another day, there is much reason to believe, that, from the succeeding storm, she would either have been totally lost, or have suffered far more damage. It might, therefore, be truly said, that, here, prompt action was the price of safety.

But I put the case upon the common ground of a fair exercise of reasonable skill and discretion; and if another course would have been (as I am not satisfied it would have been) better, I do not think under such circumstances, it could be permitted to vary the rights of the salvors. I think, then, the salvors are entitled to a liberal salvage, not upon the narrow ground of a mere compensation for labor and services, but upon the larger policy of the maritime law, looking to merit, and effort, and peril, and the duty of encouraging assistance in cases of distress.[1]

The question is, what would be a proper salvage under all the circumstances of the case? And here, again, the Court is asked to lay down some rules, by which to guide the parties in interest, underwriters, as well as owners, in the ascer-

[1] See *The Sarah*, 1 Rob. R. 313, note. *The William Beckford*, 3 Rob. R. 355. *Rowe* v. *The Brig*, 1 Mason R. 372.

tainment of the proper rate of salvage. That is asking the Court to do, what it is utterly impracticable to do, to lay down rules, in cases admitting of an indefinite diversity of circumstances, and endless considerations of value, of perils, of services, and of merit. The subject is necessarily one, in which the reward must depend upon a just estimate of all the circumstances of each particular case. The Court may, indeed, assign some general limits to its discretion in certain classes of cases approaching nearly to the same general average merit. For instance, it may say, and indeed it has said, that generally, in cases of derelict, it will not allow more than one half of the value as salvage. But extraordinary cases of great danger and gallantry may occur, in which the Court would even desert this rule. On the other hand, it may say, that it will not generally award less than one eighth, (a sum fixed by statute, as a minimum in certain cases of recapture,[1]) unless under very peculiar circumstances. Indeed, looking to the general current of decisions, it will be found, that the Court have not commonly allowed less than one third, unless where the services have been quite inconsiderable, or the amount of the property has been very great.[2] Still, this must be subject to many qualifications; and it will be found very difficult in practice to lay down any rules which, would furnish a just guide to limit the discretion of the Court. The Court must endeavour to work its own way through every case, upon a comprehensive survey of all the circumstances.

The circumstances entitled to most consideration in all cases of salvage are, the value of the property saved; the

[1] Salvage Act of 1800, ch. 14.

[2] See the cases referred to in Abbott on Shipp., P. 3, ch. 10, (4th Am. edition, 1829, by Story,) pp. 397, 398, note 1. Id. p. 400, note (1.) *Rowe* v. *The Brig*, 1 Mason R. 372.

extent of the labor and services; and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to by the Court with uncommon favor. Lord *Stowell* has spoken on this subject with his accustomed force and elegance. "The principles," says he, "on which the Court of Admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look, not merely to the exact quantum of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, the skill and dexterity, which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most, is the actual danger, which they have incurred. The value of human life is that, which is, and ought to be, principally considered in the preservation of other men's property; and, if this is shown to have been hazarded, it is most highly estimated."[1] On the other hand, the value of the property saved must always form a very important ingredient, since that proportion would be a very inadequate compensation in cases of small value, which would be truly liberal in others of great value.

As the allowance of salvage necessarily rests very much in the discretion of the Court, it is hardly possible, in many cases, that different courts, exercising independent judgment, should arrive at precisely the same conclusion. Each may exercise the most enlightened discretion; and yet, from the necessary differences of the human mind, they may differently adjust the salvage to the circumstances. On this account it has always been the disposition of the Appellate Courts of the

[1] *The William Beckford*, 3 Rob. R. 355.

United States, in all salvage cases, to discourage appeals, as mischievous and expensive to all parties. And, therefore, they generally adhere to the rate of salvage allowed in the court, from which the appeal is taken, unless the evidence clearly calls for a different proportion.[1] No Judge has been more inclined to adhere to this doctrine than myself. Still, when the question is made, it becomes my duty to examine the case with all thejust deference belonging to the judgment of others; but at the same time with some regard to the rights of the parties in respect to my own.

The allowance of the District Judge in this the present case, exceeded, in a small degree, one fifth of the whole property saved. It cannot certainly be pronounced an extravagant proportion; at the same time, with reference to the value of the property, and the duration and peril of the service, it must be admitted to be large. The time employed was less than two days; the weather was not boisterous; the peril to life, if it existed in any considerable degree, was not long, nor exceedingly critical; the season of the year was unfavorable, but the voyage was in a Sound full of ports or anchorages, where assistance might, in case of necessity, be procured, or a harbour made; the vessel was upset, but the principal cargo (logwood and mahogany) was buoyant; so that there was little danger of the wreck and loss of both, unless by some severe storm. And it may be added, that numerous vessels are perpetually passing through the same Sound; so that extraordinary hazards would have been, under common circumstances, accompanied by extraordinary means of assistance. A suggestion has been made, that the storm of the succeeding day, after the arrival at Edgartown, would

[1] *The Sibyl*, 4 Wheaton R. 98. *Tyson* v. *Prior*, 1 Gallis. R. 133. *The Dos Hermanos*, 10 Wheaton R. 306.

have very probably occasioned a total loss of the vessel and cargo, if they had not then been in port. Admitting that to be true, still it cannot constitute a material ground, in a case like the present, for enhancing the salvage. Salvage is a compensation for the rescue of the property from present, pressing, impending perils; and not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry actually exerted, and not for the possible exercise of them, which under other circumstances might have been requisite. It is allowed, because the property is saved; not, because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter, as an ingredient, into the case, when they were foreseen, to show the promptitude of the assistance, and the activity and sound judgment with which the business was conducted; but they can scarcely avail for any other purpose. Ought the salvage to be diminished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather? To introduce such ingredients into the estimate of salvage, which were neither foreseen, nor acted upon, would compel the Court to deliver itself over to conjectures, resting on loose probabilities, the nature and extent of which could never be measured. It would be to go off of soundings; to desert the facts; and to be guided by speculations, always questionable, and sometimes deceptive.

After weighing all the circumstances, I have with great reluctance come to the conclusion, that the decree assigns too high a rate of salvage. No person can entertain a higher respect for the sound judgment and ability of my learned brother, the District Judge, than myself. Nor should I incline upon slight differences of opinion to vary his decree.

But a full review of all the facts has not enabled me to arrive at the conclusion, that, consistently with my duty, I ought to affirm the decree.

In the case of *The William Beckford*, (3 Rob. R. 355,) where the property was in great distress, and the circumstances more perilous than those of the present case, though somewhat resembling them, Lord *Stowell* deemed a salvage of £1000, out of a property worth more than £17,000, to be an ample remuneration. I am not sure, that I should have arrived at a result so moderated and measured. But the decree of the District Court, in the present case, has more than trebled the proportion, under circumstances, however, of greatly diminished value.

My opinion is, that eight hundred and fifty dollars, which is a little more than one seventh of the property saved, will be a liberal compensation, looking to the value of the property at hazard, and the nature of the services performed. Of this sum, I shall decree one hundred dollars to be paid to Bartemus Luce and the thirteen other persons, whose claims were brought forward by the supplemental libel, instead of the sum allowed them by the decree of the District Court. The remaining sum is to be paid to the original libellants, belonging to the Pilot Boat Superior, and the sloop Hero; and these sums are to be apportioned and distributed among the salvors respectively, according to the distribution made by the decree of the District Court.

The costs of the District Court are to be paid by the claimants; and the costs of this Court are to be borne by the respective parties, who have incurred them.

Decree altered accordingly.

Samuel Hazard, Administrator,
v.
The New England Marine Insurance Company.

Semble. To make an abandonment effectual, the cause of the loss of the ship must be stated in the letter of abandonment, for the benefit of the underwriters.

Where, in a written application for insurance on a ship, she is represented as "a coppered ship," the meaning of this representation is to be understood according to the ordinary sense and usage of these terms in the place, where the insurance is made; unless the underwriter knows, that a different sense and usage prevail in the place, in which the ship is then lying, and in which the owner resides, and from which he writes, asking for the insurance; or has some other knowledge, that the owner uses them in a different sense from that, which prevails in the place, where the insurance is made.

If the underwriter has been misled in a matter material to the risk, by supposing the terms of the representation used in the sense of the place, where the application was made, and if the policy was underwritten by mistake, founded on such supposition, and the owner, who procured the insurance, intended to use the terms in a different sense, then the policy is void, as founded in mutual mistake.

It is essential to the validity of a contract, that the parties to it should have consented to the same subject matter in the same sense; they must have contracted *ad idem*.

A loss of a ship by worms in an ocean, where worms ordinarily assail and enter the bottoms of vessels, is not a peril of the sea within the policy.

Where a ship sustained an injury at the Cape de Verd Islands, in the loss of her false keel, whereby she became exposed to the action of the worms, which obtained entrance into her in the Pacific Ocean, and destroyed the ship, the loss does not come within the policy, it being a consequential injury. In this case, the master should have caused the ship to be repaired; and in not doing so, he was guilty of negligence, which exonerated the underwriters from the subsequent loss by worms, which was occasioned thereby.

Assumpsit on a policy of insurance, dated 26th December, 1827, whereby the defendants caused to be assured Josiah Bradlee & Co., for Thomas Hazard, Junior, of New York, fifteen thousand dollars on the ship Dawn, and outfits, at and from New York to the Pacific Ocean and elsewhere, on a whaling voyage, during her stay and fishing, and until her return to New York, or port of discharge in the United States, with liberty, &c.

The declaration contained various counts, stating a total loss of the vessel, and a partial loss of the cargo, and also a partial damage to the vessel by perils of the seas.

It appeared, in evidence, that the vessel sailed on the voyage on the 29th of December, 1827; and on her outward passage struck upon a rock at the Cape de Verd Islands, and knocked off a portion of her false keel; but proceeded on her voyage, and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December, 1829, in a very leaky condition. Upon an examination by competent surveyors there, she was found to be so entirely perforated by worms in her keel, stern, and stern-post, and some of her planks, as to be wholly innavigable; and, being incapable of repair at that place, she was condemned and sold.

It also appeared in evidence, that after the ship had sustained the injury at the Cape de Verd Islands, she put into St. Salvador, and that, both at the Cape de Verd Islands and St. Salvador, her bottom was examined by swimmers, and reported not to be materially injured.

C. G. Loring and *Webster*, for the defendants, contended,

(1.) That there was a misrepresentation of a fact material to the risk, in the application made for the insurance, which was by letter, and in which the vessel was represented to be a coppered ship. That, by the terms "coppered ship," applied to a vessel destined upon a whaling voyage in the Pacific Ocean, it would be understood, according to the usages of insurance in Boston, that the sides and bottom of her keel were covered with copper; and they adduced evidence to prove this position, and also that the keel of this vessel was not so covered.

And upon this point the plaintiff produced evidence to prove, that the keel was so covered; or, if not, that it

was, nevertheless, covered with leather, which was alleged to afford an equally permanent and effectual protection against worms.

(2.) Another point of defence was, that there had been no sufficient legal abandonment. (3.) A third point was, that a loss by worms was not a loss within the policy; and for this was cited *Martin* v. *Salem Marine Insurance Company*, 2 Mass. R. 424; Hughes on Insurance, 218; Phillips on Insurance, 251. (4.) Another point was, that if the loss by worms was a consequence of the injury done at the Cape de Verd Islands, it was too remote to entitle the plaintiffs to recover; that the injury ought to have been repaired by the master, and if he neglected it, a subsequent loss by his neglect was not chargeable to the underwriters. (5.) Another point was, that the ship was unseaworthy, it being alleged, that the copper was put on over old leather, and so was not sufficiently fastened; but this point was not much pressed. (6.) Another point was, that, if there was not a total loss, there could be no recovery for a partial loss, as the damage by perils insured against did not amount to five per cent.; but the plaintiff's counsel did not contend for a partial loss.

The plaintiff's counsel, (*W. Sullivan* and *Selden*,) on the other hand, contended, (1.) that there was a sufficient abandonment. (2.) That there was no misrepresentation. (3.) That the loss by worms was within the policy. (4.) If not generally, it was under the circumstances of this case. (5.) That the ship was seaworthy.

It is not thought necessary to report the arguments at large, as they are fully commented on by the Court.

Story J., in the course of the trial, and in summing up to the jury, gave his opinion on the points of law in substance as follows. The first question arising in this case is, whether the abandonment is sufficient in its form and substance. The

letter of abandonment is dated the 28th of July, 1830, and after stating that a letter had been received from Captain Gardiner, the master of the vessel insured, of which it annexes a copy, adds, we hereby abandon to the underwriters on that ship and outfits, the interest insured. The letter of Captain Gardiner states nothing farther in relation to the loss of the ship, than is contained in the following passages. "The unfortunate situation I have been placed in by the failure of the ship Dawn, and all the particulars relative to my transactions, will be forwarded to you in a duplicate by Mr. S. R., whom I have authorized to that effect, by the earliest opportunity. I have shipped, on account of ship Dawn, 38,800 gallons of sperm oil; quantity obtained 53,541 gallons. The ship was stripped, sold in lots, also her stores, provisions, &c. The nett amount of sales was $6496·74; disbursements during the voyage, and expenses at this place have been about $5000." The objection to the abandonment is, that there is no statement of the cause of the loss, so as to show, that it is by a peril within the policy, for which an abandonment may justly be made. I confess, that I have always understood the law to be, that in an abandonment the cause of the loss must be stated, so that the underwriter may know, whether it is a loss by a peril within the policy, and may exercise his judgment upon the facts, whether to accept or refuse the abandonment. Nor do I well see, how an abandonment can be made without stating a case justifying the act. It seems difficult to see, in the present abandonment, any distinct statement of a loss by any peril insured against. The only allegation is, that there has been a failure of the ship; but this may be from causes wholly without the perils of the policy. The ship may have failed from the mere waste and decay incident to the voyage, without any extraordinary peril. Still, as there are other most important points

in this case, whatever my own opinion may be, I shall for the purposes of the trial rule, and I do accordingly rule, that, under all the circumstances of the case, the abandonment is sufficient in point of law.

The next question is, whether there has been a false representation in any thing material to the risk. The letter of instructions, of the 22d December, 1827, under which the policy was procured to be underwritten, asserts, "She (the ship) has been newly coppered to light water mark, above which she is sheltered with leather to the wales, and fitted in every respect in the best manner," &c.; and insurance was asked on the vessel for a whaling voyage. Now, I may state at once to the jury, that the representation of facts, stated in this letter, so far as they were material to the risk, must be substantially true. If the ship was not coppered, as stated in that letter, and she did not in that respect correspond with that representation, and the difference between the facts and the representation was material to the risk, then the plaintiff is not entitled to recover upon the policy. But I shall leave the facts, as to the representation and its materiality, to the jury. The words in the letter represent the ship to be newly coppered to light water mark. The underwriters insist, that the ship was not coppered according to this representation; and it is for the jury to determine, what constitutes a coppered ship. If the jury shall find from the evidence, that, in order to constitute what is called a coppered ship, the bottom of the keel and the sides of the keel, as well as the sides of the vessel, must be coppered; and if they should farther find from the evidence, that this ship was not so coppered, and the deficiency was material to the risk, then there was not a compliance with the terms of the letter left with the underwriters, and the latter are not liable upon the policy. Or, if the jury should find from the evidence,

that a ship coppered on her sides and also on the sides of her keel, and not on the bottom of the keel, or false keel, would meet the representation of a coppered ship on other voyages; but that, in whaling voyages in the Pacific Ocean, the usual and customary mode is to copper the bottom or false keel, and it is understood by underwriters, when application is made for insurance on such voyages, that the vessels are so coppered, unless the contrary is stated; then, inasmuch as the letter applying for insurance is an application for insurance of a vessel on a whaling voyage in the Pacific Ocean, the underwriters had a right to consider the representation in the letter, as describing the vessel as coppered in the manner, in which vessels are usually coppered for such voyages; and if the ship was not so coppered, and that deficiency was material to the risk, the terms of the letter were not complied with, and the defendants were not bound by the policy.

It has been argued on behalf of the plaintiffs, that the representation in the letter, as to the ship's being coppered, is to be construed and decided by the meaning of those terms in the port of New York, where the letter was written, and the owner resided, and where the voyage was to commence and end; and not by the meaning of the words in Boston, where the insurance was made, although the latter was the only sense, in which the underwriters could or did understand the terms, at the time when the insurance was made. I am decidedly of a different opinion; and I think the doctrine utterly irreconcilable with the first principles in the interpretation of contracts, and especially of contracts governed by the *lex loci contractûs*. In my judgment, it is wholly immaterial, as to this point, where the owner resided, or where the letter was written, or where the voyage was to commence or end. This is not a question as to the usage of trade in a particular port, with reference to a particular voyage, or of seawor-

thiness for such a voyage. The question is not here, whether the ship was seaworthy for a whaling voyage according to the usage of the port, where the voyage was to begin and end. She might have been so, for aught I know, in the port of New York, without such entire coppering of the whole keel, as the underwriters now contend for. And if there had been no representation at all of the fact, if the vessel had been seaworthy for the voyage according to the usage of New York, the underwriters would have been bound by the policy. But, here, there is a positive representation of a fact; and whether that fact be or be not necessary to seaworthiness, is of no consequence, if it is still a fact material to the risk, and in regard to which the underwriters have been misled by the representation. The fact of extra-seaworthiness may with them constitute a solid reason for underwriting the policy. A fact indicating superior and extraordinary safety, or uncommon protection from danger, by very excellent equipments, seamanship, or structure, may, as a fact leading to a decrease of the risk, be the very inducement to take the policy. An old ship may be seaworthy; but she may not be as safe as a new ship; and if an old ship is represented as a new ship, and it is material to the risk, though the old ship be seaworthy, can it be, that the underwriters are bound?

Here, then, the underwriters are in Boston; the proposal is offered, and the letter is shown, and the representation is made in Boston; the policy itself is underwritten in Boston; and it is a contract made and to be executed in Boston, and, of course, is to be construed by the law of Massachusetts, and the meaning and usage of words in that State. If any thing is settled, as to the operation of the *lex loci contractûs*, I think this principle is. According to the usage of the terms in Boston, (I will suppose for the purpose of the argument,) the words, "coppered ship," mean a ship coppered

on her whole keel and false keel, as well as on her sides; and especially in whaling voyages, a coppered ship is always so understood by all persons in Boston. The underwriters have not the slightest knowledge, that a different meaning is attached to the words elsewhere, and especially not in New York. They underwrite the policy upon the faith of the representation, that the ship is a coppered ship, in the only sense of the terms known to them, or which they have the slightest reason to conjecture. The owner gives them no information, that he uses the words in a different sense; and the very agent in Boston, who procures the insurance, and to whom the uniform sense of the words in Boston must be equally well known, is silent in regard to any difference. If the agent had by parol asked for the insurance in Boston, and made at the time a parol representation, that the ship was a coppered ship, must he not be deemed to represent her to be so in the Boston sense of the words? And if so, can it make any difference, that the representation is made in writing in the same place?

I do not say, that the owner, or the agent, practised a fraud upon the underwriters by procuring a policy under such circumstances, by misleading the underwriters. All the parties may have been equally innocent. The owner in New York may not have been aware, that the meaning of "a coppered ship" in Boston, is different from the meaning of such a ship in New York. The agent in Boston may have been equally as ignorant, as the underwriters, in regard to the New York sense. What, then, under such circumstances, would be the consequence? Plainly, that it would be a contract founded in mutual mistake; and therefore neither party would be bound by it. They would not have contracted *ad idem*. There would never have been an agreement to the same subject matter in the same sense. This principle is so well known

fore foot and the greater part of her false keel were gone; her stern-post injured; and for the most part her sheathing and copper entirely gone; and many parts of the plank of the bottom were destroyed; and she was accordingly condemned as unworthy of repair. The immediate cause of the loss seems, by the course of the argument, admitted to have been the perforation of the keel by worms. Whether the keel was, or was not coppered on the sides, has been much contested, and the evidence is contradictory. But it seems admitted, that the bottom of the keel was not coppered, but only covered with the leather; and the sides of the keel, if not coppered, were also covered with leather.

The question is, whether a loss by worms is, in the sense of the policy, a loss by the perils of the seas. If the jury shall find from the evidence, that in the Pacific Ocean worms ordinarily assail and enter the bottoms of vessels, then, in my opinion, a loss of the ship by worms, under such circumstances, in that ocean, is not a peril of the seas within the meaning of the policy. The policy is intended, not to cover ordinary perils, in the nature of wear and tear, in the voyage; but extraordinary perils. If the question were entirely new, I should upon principle adhere to this doctrine. But it appears to me, that it is fully settled by authority. This is a policy underwritten, and to be executed in Massachusetts; and therefore it is to be treated as a Massachusetts contract. It has been decided in the courts of this State, that damage, arising from an injury by worms, is not a loss within the policy;[1] and my opinion is, that underwriters in Boston must be

[1] *Martin* v. *The Salem Marine Insurance Company*, 2 Mass. R. 421. See also *Rohl* v. *Parr*, 1 Esp. Rep. 444. Benecke on Insurance, 456. Hughes on Insurance, 218. Phillips on Insurance, 251. *Hunter* v. *Potts*, 4 Camp. R. 203.

deemed to contract in reference to this course of decision; and that consequently they are not liable for losses occasioned by worms.

But, it has been contended on behalf of the plaintiffs, that, even admitting that the destruction of the ship has been by worms, and that such a loss is not, under ordinary circumstances, a loss within the policy; yet it appears by the evidence in this case, that the access of the worms to the keel was owing to the accident and damage done to the keel at the Cape de Verd Islands, by striking against a rock; and that under these circumstances the ultimate loss is to be attributed to this accident, and so is a loss within the policy. It is added, that in all cases, where the loss is inevitable in consequence of the accident, the loss is properly immediate, although it may not in point of time happen until long afterwards. In other words, a loss is deemed immediate, not because it happens *eo instanti*, but because it is inevitable. And examples have been put at the bar in illustration of this doctrine. My opinion is, that in no just sense can this loss, if by worms, be deemed a loss immediate upon the accidental injury alluded to. The general rule in cases of insurance is, that the loss is to be attributed, not to the remote, but to the immediate cause. *Causa proxima, non remota, spectatur.* The injury by striking on the rock at the Cape de Verd Islands, might have been the occasion, or even the remote cause of the loss of the ship; but it was not the immediate cause. The immediate cause was the perforation of the keel by worms. The loss happened many months after the accident. I have, therefore, no difficulty in stating to the jury, that if, in consequence of the injury sustained at the Cape de Verd Islands, the false keel was torn off, whereby the ship became exposed to the action of the worms, and that they thereby obtained entrance, and destroyed the ship, the loss would not

come within the policy, it being a consequential injury, against which the underwriters are not considered as taking the risk.

But an additional answer to this part of the case has been given by the counsel for the defendants, upon which it becomes my duty to express an opinion. It is said, that, even if the loss could be thus traced back immediately to the accident at the Cape de Verd Islands; yet the underwriters would not be liable, because it was the duty of the master, if he could, (and it is not shown, that he could not,) to repair the damage so done; and if he did not, the subsequent loss is properly attributable to his negligence; and that the underwriters are not liable for a loss by worms occasioned by such negligence. Upon this point my opinion is, that if the injury at the Cape de Verd Islands was reparable, and could have been repaired there, or at St. Salvador, or at any other port at which the ship stopped in the course of her voyage, it was the duty of the master, and he was bound, to cause such repairs to be made, if they were material to prevent a loss. And if he omitted to make such repairs, because he did not deem them necessary; and if by such neglect alone the subsequent loss by worms was occasioned, the underwriters are not liable for the loss so occasioned.

The Court have also been called upon by the plaintiff's counsel to instruct the jury as follows; first, that if the jury believe, that the underwriters would not have charged a higher rate of premium, if the vessel had been correctly represented, than they did charge, and that the insured had not intentionally misrepresented the facts, then the representation is not material, and does not defeat the policy; secondly, that if they believe, that the object of coppering the bottom of the keel is to protect against worms, and if they also believe the leather an equal protection, and that it was put on, in

that case the letter would not be considered a material misrepresentation. I feel myself compelled to refuse to give the instructions in the terms prayed. But upon the first point, I am of opinion, and so direct the jury, that if the fact stated was not material to the risk, and would not have varied the conduct of the underwriters, either as to the premium of insurance, or as to underwriting the policy at all, if the fact had been correctly represented, and the insured has not intentionally misrepresented the facts, then the misrepresentation will not prevent the insured from a recovery in this case, or defeat the policy. And on the second point, I direct the jury, that if the object of coppering the bottom of the keel was to protect it against worms, and if they believe, that leather is an equal protection, still, if the fact was, that the letter of instructions did contain a representation, which was and might have been understood as representing, that the keel was coppered, and if that fact was material to the risk, and might have induced the underwriters to ask a higher premium, or not to have underwritten at all, then the misrepresentation of its being coppered, when it was leathered, would avoid the policy. But if it was not a fact material to the risk, and would not have changed the conduct of the underwriters, either as to underwriting at all, or as to asking a higher premium, then the misrepresentation would not avoid the policy.

With these directions, after summing up, and commenting on the facts, the Judge left the cause to the jury, who found a verdict for the defendants, upon which judgment was rendered accordingly.

Memorandum. A bill of exceptions was filed, and the cause was carried by a writ of error to the Supreme Court, where, upon argument at January Term, 1834, the judgment was reversed for error in stating, that the letter of instructions, under which the insurance was made, was to be understood

according to the sense of the terms "coppered ship," as known and used in the place (Boston) where the insurance was applied for and made. But upon all the other points in the case, the directions of the Court were held to be correct. See 8 Peters R. 557.

JOHN GLIDDEN AND OTHERS

v.

THE MANUFACTURERS' INSURANCE COMPANY.

A vessel was insured from A to B, and her port of discharge in the United States. She went to C, and took in a return cargo for D, and stopped at S on the return voyage. The underwriters signed a memorandum, that the deviation to S should not prejudice the insurance, the vessel having sailed from thence to E. There was a total loss by shipwreck. *Held*, that the memorandum did not help the deviation of going to C instead of B; and that the misstatement of the return voyage being to E, made the memorandum of no effect.

ASSUMPSIT on a policy of insurance. At the trial, which was upon the general issue, there was a demurrer to the evidence, upon which the cause was submitted to the decision of the Court, by *Webster* and *Kinsman* for the plaintiffs, and *Sohier* for the defendants. The facts and grounds of the case will sufficiently appear by the opinion of the Court.

STORY J. On the 4th of August, 1830, John Kendrick & Co. caused a policy to be underwritten, for whom it may concern, payable to them in case of loss, (on account of the plaintiffs,) two thousand dollars on the schooner Orono, from Newcastle, (Maine,) to her port of discharge in Martinique, and at and from thence to her port of discharge in the United States, at a premium of five per cent., (the vessel being valued at $3000,) against the common perils. The vessel

had sailed on the voyage on the 11th of June preceding. Instead of going to Martinique, she went to Mariegalante and arrived there on the 14th of July of the same year. She there disposed of her cargo, and took on board a return cargo, without going to Martinique, and departed from thence on the 15th of August, on her return home, being bound to Damariscotta in the State of Maine, and not to Boston. She arrived off, and touched at, St. Eustatia on the 17th of August, and on the 12th of September was shipwrecked and lost, on Lenikin's Neck, in Booth's Bay in Maine, while proceeding towards Damariscotta. An abandonment was duly made, but not accepted; and a claim is now made for a total loss.

These facts are admitted upon a demurrer to the evidence; and if these constituted the whole of the plaintiffs' case, it would be very clear, that they would not be entitled to recover; for there was a deviation from the voyage stated in the policy, the schooner never having gone to Martinique; and, of course, the return voyage of the policy never commenced. But on the 11th of September, 1830, it having been ascertained, that the vessel had been at St. Eustatia, the following memorandum was, by consent of all parties, added to the policy. "Boston, September 11th, 1830. It is now understood, that the within insured vessel has been to St. Eustatia, and sailed thence *for Boston* about twenty-five days since, which deviation shall not prejudice the within insurance." The question is, whether this memorandum helps the plaintiffs' case. I am of opinion it does not. In the first place, it waives nothing more than the deviation from the voyage by going to St. Eustatia, and not that by going to Mariegalante, and not going to Martinique. In the next place, this waiver is only upon a statement in the memorandum, that the voyage was from St. Eustatia to Boston; whereas it was in fact

to Damariscotta. So that, whether the memorandum is taken to be a conditional waiver, or whether it is taken to be substantially the substitution of a new risk, namely, a voyage from St. Eustatia to Boston, the objection is equally fatal. There was either a deviation not waived, or a non-inception of the new voyage.

Upon the demurrer to the evidence, therefore, judgment must pass for the defendants.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1832, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

PHILIP SISSON AND OTHERS *v.* CORNELIUS SEABURY.

A devise to "A and to his male *children*, lawfully begotten of his body, and *their heirs* for ever, to be equally divided amongst them and their heirs for ever," passes a life estate to A, with a contingent remainder in fee to his children, (he having, at the making of the will, no children.)

The Statute of 4 & 5 Anne, ch. 16, respecting collateral warranty, &c., has been adopted in Rhode Island.

EJECTMENT for land in Tiverton, Rhode Island. Plea, general issue.

The parties agreed to a special statement of facts as follows.

"On the 20th day of August, A. D. 1775, Thomas Sisson, then of Tiverton, Rhode Island, being of sound mind and competent to make a will, made and duly executed his last will and testament, in the words and figures, as set out in the certified copy thereof marked A, herewith filed as part of this agreement, and admitted as sufficient evidence of the said will, and the probate thereof; and the said Thomas died between

the day last named and the 20th day of January, A. D. 1777, on which day the said will was duly proved, approved, and ordered to be recorded by the Court of Probate of the said town of Tiverton, as and for the last will and testament of the said Thomas, then deceased, and took effect as such; and the said will and probate are in all respects valid and effectual. Philip Sisson, the grandson of said Thomas, named as a devisee in said will, was at the time of the execution of said will, under the age of twenty-one years, and, at that time and also at the time of the probate of said will, had had no children, and had never been married; but after the decease of said Thomas, the said Philip went into possession of the lands, tenements, and appurtenances devised to him in and by said will, under and according to said will, and the terms of the devise and devises to him therein; the same lands so devised to him including the premises demanded in this suit, as well as other lands lying in Massachusetts; and remained in possession of the premises demanded in this suit, (being part of the lands so devised as aforesaid to him,) under and by virtue of said will and devise, until the 29th day of March, A. D. 1814, on which day he duly made, executed, and delivered to the defendant the deed marked B, herewith filed, and agreed to be a part of this statement, and duly and legally acknowledged the same in manner as appears thereon, under which deed the defendant went into possession of the demanded premises, and has remained ever since, and still is, in possession thereof.

"The said Philip Sisson, in January, A. D. 1785, was lawfully married to Susannah Bowen, now Susannah Sisson, by whom he had the following named children, male and female, of his body lawfully begotten in wedlock, namely; Elizabeth, a daughter since married to Jabez Howland; Hannah, a daughter since married to Peleg Taber; Thomas, a

son; Holden, a son; Susan, a daughter, since married to John Tripp; Abraham, a son; Nathan, a son; Cook, a son; Henry Wilbur, a son; Lydia, a daughter, since married to Timothy Ingersoll; Abigail, a daughter, since married to Jacob Lyons; Pamela A., a daughter, since married to Asa M. Lucas; Philip, a son; and Phebe, a daughter, since married to Ezekiel S. Russell; all which said children of said Philip and Susannah, excepting the said son Nathan, and all which said husbands of said female children, are the plaintiffs in this suit, and now living. The said Nathan died in August, A. D. 1818, intestate and without issue, leaving his said brothers and sisters his heirs at law. The said plaintiffs and the defendant are citizens of the several States, and reside in the several places, as stated in the plaintiffs' declaration; and the said children of the said Philip Sisson were born at the several times mentioned in the deposition of said Susannah, marked C, which is admitted, and is to be taken, as part of this statement, and all the matters stated therein are agreed to be true.

"The said deed to the defendant comprises, not only the land demanded in this suit, but a part also of the lands so devised to said Philip, lying in Massachusetts.

"The said Philip Sisson, named in said will, and father of the children and plaintiffs aforesaid, died in Indiana, in September, A. D. 1817; and since his decease, the said premises were demanded of said defendant, by Thomas Sisson, one of the plaintiffs in this suit, on the ground, that the said Philip, deceased, had but a life estate therein, and claiming title by way of remainder, under said will."[1]

[1] The papers herein referred to, marked A, B, C, are omitted, they not being important to the true understanding of the decision.

The cause was elaborately argued by *Tillinghast* and *Whipple* for the plaintiffs, and by *Hunter* and *R. W. Greene* for the defendant.*

Story J. The principal question in this case turns upon a devise in the will of Thomas Sisson, made in 1775. It is in the following words: "Item, I give and bequeath to my loving grandson, Philip Sisson, all my homestead farm and housing thereon standing, lying part in said Tiverton, and part in the township of Dartmouth, in the Province of Massachusetts Bay, with all my other lands, and salt meadows, and sedge flats in said Dartmouth, to him, my said grandson Philip Sisson, *and to his male children lawfully begotten of his body, and their heirs for ever, to be equally divided amongst them and their heirs for ever.*" The testator died in 1777, leaving the said Philip Sisson a minor under age, (the argument says eleven years old only,) without children, not then having been married. The question is, what estate he took under the will. If he took an estate tail, it has been docked by a conveyance duly made by him according to the Statute of Rhode Island for barring estates tail. If he took an estate for life only, and his children, afterwards born, took a fee in remainder, then the plaintiffs are entitled to recover the premises, unless they are barred by the warranty of their ancestor in the conveyance, by which he docked the entail.

The case has been very thoroughly argued; and is certainly

* The very learned arguments in this case were in writing; and the Reporter was desirous of presenting an abstract of them; but, residing at a distance from the counsel, he was unable to procure, probably on account of some miscarriage, the arguments on one side, though those on the other side were politely forwarded to him. The great fullness, with which the Court has gone into the consideration of the authorities, will make this necessary omission, perhaps, less regretted.

not without its difficulties, when viewed in connexion with the authorities. The general rule is, that, in construing wills, the intention of the testator is the pole star to guide and govern the Court. But this rule carries us but a very little way; for the inquiry still remains, what that intention is, and how it is to be ascertained. Now, the intention is to be sought for, not only by consulting the words of the will, and the posture of the facts, which must have had an influence, when it was framed, and constituting, if one may so say, a part of the *res gestæ*; but also by the rules of interpretation, in some measure artificial, which have been from time to time adopted by courts of law for the ascertainment of the intention. Where such rules have long prevailed, it would produce infinite mischiefs to depart from them; for it would necessarily loosen the whole foundation of the titles to real estate, and unsettle all that constitutes safety or security in the administration of the law; I mean, the adherence to precedents. And then, again, not only rules of interpretation, but expositions of certain phrases, found in certain connexions in wills, are entitled to great influence in deciding other cases similarly circumstanced. In short, precedents constitute the material basis of this department of the law, as well as of others, in regard to the mode of searching out, and fixing the intention of the testator. So that it may be truly affirmed, though it seems, at first view, somewhat paradoxical, that the intention, as expounded by courts of law, is, or may be, very often quite different from the private intention and understanding of the testator.

The difficulty of construing wills in any satisfactory manner, renders this one of the most perplexing branches of the law. The cases almost overwhelm us at every step of our progress; and any attempts even to classify them, much less to harmonize them, is full of the most perilous labor. Lord

Eldon has observed, that the mind is overpowered by their multitudes, and the subtilty of the distinctions between them.[1] To lay down any positive and definite rules of universal application in the interpretation of wills, must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty. The unavoidable imperfections of human language, the obscure and often inconsistent expressions of intention, and the utter inability of the human mind to foresee the possible combinations of events, must for ever afford an ample field for doubt and discussion, so long as testators are at liberty to frame their wills in their own way, without being tied down to any technical and formal language. It ought not, therefore, to surprise us, that in this branch of the law the words used should present *an infinite* variety of combinations, and thus involve an infinite variety of shades of meaning, as well as of decision.

In considering the present case, it may be well, first to look at the words of the devise, and ascertain, if we can, what is their natural and appropriate meaning. Having done so, we may then endeavour to ascertain, if the authorities present any solid ground for a different construction. If they fortify, rather than repel the natural import of the words, then they may afford strong reasons for adhering to it. If, on the other hand, they are opposed to it, then it is to be considered, whether they are so exactly in point, as to justify us in surrendering it, and following the conclusions, which they indicate.

I shall confine my remarks chiefly to the direct devise; for although the other clauses in the will may furnish some illustrative lights, they do not seem to me strong enough to lead to any decisive conclusion. Two facts, however, are impor-

[1] *Jesson* v. *Wright*, 2 Bligh R. 50.

tant to be mentioned; one is, that the testator professes an intention in the introductory part of his will, to dispose of all his worldly estate; and there is no residuary clause. So that he must have supposed himself to have made a final disposal of all his estate, in the specific devises. Another fact is, that the devisee, Philip Sisson, was a minor, unmarried and without children, at the time of making the will, and at the death of the testator.

Let us then proceed to the words of the will. The first part of the clause is, "I give and bequeath unto my loving grandson, Philip Sisson, &c., and to his male children, lawfully begotten of his body," &c. If the will had stopped here, there could not have been a doubt, either upon principle or authority, that it was the intention of the testator to create an estate in tail male in the devisee. In the first place, the words import a devise *in presenti*, and as the devisee had no children at the time of the will, if we construe the words, "his heirs male," &c., as words of purchase, and a *designatio personarum in presenti*, the devise becomes utterly void, from the want of proper objects *in esse* to take; so that the intention of the testator is defeated. On the other hand, if they are construed, as words of limitation, designating the succession of heirs to the estate, full effect is given to the words of the will, and the intention of the testator is accomplished. *Ut res magis valeat, quam pereat*, the latter construction ought to be adopted. This is exactly in conformity to one of the resolutions in *Wild*'s case, (6 Co. R. 17,) which was decided by all the Judges in England. "This difference," says my Lord *Coke*, "was resolved for good law; that if A devises his land to B, and to his *children* or *issues*, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain, that his children or issues should take;

and as immediate devisees they cannot take, because they are not *in rerum naturâ*; and by way of remainder they cannot take; for that was not his intent, for the gift is immediate. Therefore, these such words shall be taken as words of limitation, *scilicet*, as much as children or issues of his body." Now, *Wild's* case has constantly been admitted to be good law; and relied on in many subsequent cases.[1] The present case is even stronger than the resolution in *Wild's* case; for the words implied there, "lawfully begotten of his body," are here expressed.

The whole difficulty is upon the succeeding part of the clause, "his male children, &c., *and their heirs for ever*, to be *equally divided* among them and *their heirs for ever*." Now, certainly, in construing the words of the devise, we must take the whole together; and as the former words may be enlarged by the latter, so they may also be restrained and qualified, or explained, by the latter. We are not bound to give an absolute technical sense to one part of the language, and then reject all other parts, as inconsistent with it. Lord Chief Justice *Willes*, (and he was a very great judge,) remarked with great force and sagacity, that "a mistaken notion has prevailed, that particular words in a will are as much technical words, as others are in a deed; and as necessarily pass such an estate in a will, as others do in a deed; as, for instance, that the words *issue* or *children*, where there are none at the time of the devise, do as necessarily create an estate tail in a will, as 'heirs of the body' do in a deed;" and he then added, that much confusion, in respect to the construction of wills, had been occasioned by this mistake.[2]

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[1] See *Ginger* v. *White*, Willes R. 348. *Seale* v. *Barter*, 2 Bos. & Pull. R. 485, 494.

[2] Ibid.

Now, the obvious sense of these words of the devise, taken in connexion, is, that all the male children of the devisee, Philip Sisson, are to have equal shares in the devised premises in fee simple. The devise is "to the *male children and their heirs* for ever," the very words, which are expressive of a fee simple; and the premises are to be equally divided among them, (that is, among the male children,) and their heirs, which are equally expressive of an equality of shares in the inheritance.

If this be the obvious sense of the words, and the intention of the testator, the next inquiry is, whether it can be carried into effect by the rules of law. Certainly it can be, if we construe the whole clause to be a devise to Philip Sisson for life, with a contingent remainder in fee simple to his children, as purchasers, share and share alike. And it can be accomplished in no other manner. Upon this construction, the remainder would be contingent, until the devisee should have a male child born. It would then vest in him in fee, and open to let in any after-born children in the life of the father.[1] In this way the inheritance would go exactly in the line, and in the shares, marked out by the testator.

Why, then, should not this construction be given to the clause? It is repugnant to no words in the will. It conforms to the apparent intention of the testator. It satisfies the rules of law. If, on the other hand, we construe the devise, as giving a fee tail to Philip Sisson, the whole of the words, succeeding the first part of the clause, are to be struck out of the will. They are repugnant to an estate tail in Philip Sisson. His male children cannot, if he takes an estate tail, have a fee simple, and they cannot take equally. On the

[1] See *Right* v. *Crebor*, 5 Barn. & Cressw. R. 866. *Doe* v. *Perryn*, 3 T. R. 484.

contrary, the eldest son and his issue are to take the whole. The only possible objection to it is, that if Philip Sisson should have children, all of whom should die in his life time, leaving issue, the issue could not take under the will. But this is no more than what may occur in every other case of a lapsed devise.

But it may be said, that in order to give this construction to the devise, the Court is compelled to insert the words, "for life," after the words of devise to Philip Sisson; or, in other words, the Court is compelled to introduce a qualification not found in the text. If this be admitted, still the posture of the case is not changed; for by the general rules of law, where the estate is indefinite, the party takes for life only, unless a different intention be clearly indicated. The testator has not said in terms, that Philip Sisson shall have an estate tail. If the Court is to give such a construction to the devise, it must depart from the words used, and substitute for "*male children*," the words "*heirs male* of his body." In either case the Court is compelled to ascertain, what is not expressed, that is, to imply a qualification or limitation upon language absolutely indefinite. Now, there is no rule of construction better founded in common sense, as well as in law, than the rule, that effect is to be given to all the words used, if they are sensible in the place, in which they occur, and if no apparent intention of the testator is thereby violated. Where words of devise are used, giving an estate to A, and then to B, no one would doubt, that the estate to A was a mere life estate, although not so expressly limited. It results from a general rule of law. If the testator, instead of designating the second devisee by name, uses words, which are commonly a mere *descriptio personarum*, the conclusion is equally natural, that the estate to A is for life only. We are at liberty to abandon this conclusion only when there is an

apparent intent to use the words, as words of limitation, and not as words of description. "Male children" are not, technically speaking, words of limitation, but of description of persons. The Court ought, then, clearly to see, that they are used as words of limitation, before it abandons their common meaning.

On the other hand, the construction, that the will gives an estate tail to Philip Sisson, compels us to reject the whole of the superadded words, and to deprive them, not only of their ordinary meaning, but of all meaning. Now, it may be admitted, that where the testator has expressed two intentions, which are incompatible with each other, the general intention ought to prevail over the particular intention; otherwise, there would be a total failure of the devise from uncertainty or repugnancy. And, notwithstanding this rule, giving effect to a general over a particular intent, has been sometimes objected to, it seems to me plainly founded in common sense; and it is certainly fully borne out by the authorities. Thus, an express devise for life has often, from the accompanying words, been held to carry a fee tail.[1]

If, then, looking solely to the terms of the will, we should be naturally, nay, necessarily led to the conclusion, that to give effect to all the words of the will, the devise ought to be construed, as an estate to Philip Sisson for life only, with a contingent remainder in fee to his male children; and in point of law, such a devise would be good and effectual; let

[1] See *Burnet* v. *Coby*, 1 Barn. K. B. R. 367. *Loddington* v. *Kime*, 1 Ld. Raym. R. 203. *Goodright* v. *Pullyn*, 2 Ld. Raym. R. 1437. *S. C.* 2 Strange R. 729. *Wright* v. *Pearson*, 1 Eden R. 119. *Measure* v. *Gee*, 5 Barn. & Adolp. R. 910. *Robinson* v. *Robinson*, 1 Burr. R. 38. *Doe* v. *Smith*, 7 T. R. 527. *Doe* v. *Cooper*, 1 East R. 229. *Doe* v. *Featherstone*, 1 Barn. & Adolp. R. 944. *Pierson* v. *Vickars*, 5 East R. 548. *Jesson* v. *Wright*, 2 Bligh R. 1, 51. *Seaward* v. *Willock*, 5 East R. 198.

us see, in the next place, whether the case is so bound up by authority, as to forbid a resort to this mode of interpreting it.

Now, it appears to me, that a careful survey of the authorities will demonstrate, not only, that the Court may, but ought to give this very interpretation to the devise. The authorities, which are apparently the other way, are all distinguishable, and leave the present case wholly unaffected in principle; or at least, if this be not universally true, the great mass of these authorities are consistent with it.

In the first place, as to the authorities in favor of the interpretation. I do not pretend to go over all of them; but I will mention some of those most directly in point, premising only, that some of them go to show, that where the first estate is given indefinitely, it may be restrained to a life estate; and others, to show the controlling effect of the superadded words. Indeed, where an estate is given indefinitely, the rule of law is, (as I have already suggested,) that it is to be deemed a life estate only, unless that construction be repelled by the context.

In *Loddington* v. *Kime*, (1 Ld. Raym. R. 203,) the words of the devise were, to A *for life*, and in case he should have any issue male, then to such *issue male and his heirs for ever*, and if he should die without issue male, then to B, and his heirs for ever. And it was held, that A took an estate for life only, with a contingent remainder in fee to his issue male. Here, indeed, the words for life were inserted; but as there was a devise over, those words alone would not have prevented A from taking an estate tail.[1] The effective ground of the determination was upon the superadded words, "issue male and his heirs for ever." Lord *Raymond* says, that the

[1] See *Robinson* v. *Robinson*, 1 Burr. R. 38. *Doe* v. *Lansing*, 2 Burr. R. 1100, 1107. *Pierson* v. *Vickars*, 5 East R. 548.

judges held, that the testator designed the words, issue male, to be a description of the person, "because, (he added,) of the farther limitation to the issue, namely, and to the heirs of such issue for ever."

In *Ginger* v. *White*, (Willes R. 348,) the devise was to his son A for life, and to his daughter S for life, in case she lived unmarried, in common between them; but if the said S shall marry, or die before A, then A to have the sole use for life, and from and after the decease of the said A and S, or other determination of their estate therein, to the male children of A successively, one after another, as they are in priority of age, and *to their heirs;* and, in default of such male children, to the female children of A, *and their heirs;* and in case A should die *without issue*, to W in fee. It was held, that A took an estate for life only, and the children (by reason of the devise over) an estate tail general by purchase.

In *Doe* v. *Laming*, (2 Burr. R. 1100,) the devise was to A, and the heirs of his body lawfully to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and not as joint tenants. It was held that A took an estate for life only, and that the heirs of her body were entitled to a fee as purchasers. The Court relied upon the superadded words, as unequivocal, to show the intention of the testator. That case is as directly in point with the present, as can well be imagined. There were no words limiting the estate to A for life. In one respect it was stronger; for the testator had used the words, "heirs of her body," which are peculiarly appropriate to an estate tail; and yet, upon the plain force of the superadded words, those words were withdrawn from their natural meaning, as words of limitation. In the present case, the words are "male children," which, as contradistinguished from "heirs of the body," naturally

import words of description, and not words of limitation.[1] Unless, indeed, this case of *Doe* v. *Laming* can be overturned, and it has never yet been overturned, I for one do not see, how the present case can be differently decided.

In *Doe* v. *Perryn*, (3 T. R. 384,) the devise was to A, the wife of B, for life, remainder to trustees, to preserve contingent remainders, remainder to the *children* of A and B, and their heirs for ever, to be divided among them equally, and if but one child, to such child only and his heirs for ever; and for *default* of such issue, remainder over. A and B, at the death of the devisor, had no child. It was held, that the estate was a contingent remainder in fee to the children, which on the birth of a child would vest in that child, subject to open in favor of after-born children.

In *Doe* v. *Collis*, (4 T. R. 294,) the devise was to the testator's two daughters, to be equally divided between them, namely, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the *issue of her body*, and their heirs for ever. It was held, that the second daughter took an estate for life, with remainder to her children as purchasers in fee.

In *Burnsall* v. *Davy*, (1 Bos. & Pull. R. 215,) the devise was to A, and the issue of her body, as tenants in common, but in default of such issue, or if all die under twenty-one years, without leaving issue, remainder over. A never had any issue. It was held, that A took for life with a contingent remainder to the issue as purchasers.

In *Crump* v. *Norwood*, (7 Taunt. R. 362,) the devise (of gavelkind lands), stripped of unimportant circumstances, was to A for life, and after his decease to the heirs of his body, and, if more than one, equally to be divided, and to take as

[1] See *Doe* v. *Perryn*, 3 T. R. 484.

tenants in common, and if but one, to such one only, and to his, her, or their heirs; and if A dies without issue, or, leaving such, they should all die without attaining twenty-one years, remainder over. It was held, that A took for life, with remainder to his children, as tenants in common in fee.

In *Doe* v. *Burnsall*, (6 T. R. 30,) the devise was to A, and to the issue of her body lawfully to be begotten, as tenants in common, if more than one, and, in default of such issue, &c., devise over. It was held, that A took an estate for life only, and the limitation to her children was a contingent remainder to them as purchasers.

In *Grettan* v. *Haward*, (6 Taunt. R. 94,) the devise was to A, she paying my just debts, and after her decease to the heirs of her body, share and share alike, if more than one, and in default of issue to her own disposal. It was held, that A took for life only, with a remainder in fee to all her children.

In *Doe* v. *Elvey*, (4 East R. 313,) the devise was to A, and to the issue of his body lawfully begotten or to be begotten, his, her, or their heirs, equally to be divided if more than one; and in default of issue, &c., a devise over. It was strongly intimated by the Court, that A took an estate for life only; but it was unnecessary to decide the point.

In *Doe* v. *Jesson*, (5 Maule & Selw. R. 95,) the devise was to A for life, and after his decease unto the *heirs of his body*, in such shares and proportions as A should appoint, &c., and for want thereof to the heirs of the body of A, share and share alike, as tenants in common, and if but one child, the whole to such child only; and for want of such issue, to the testator's own heirs. It was held by the Court of King's Bench, that A took an estate for life, and his children took an estate for life. We shall presently see, that this decision has been overturned by the House of Lords upon its own

circumstances, and principally because the plain import of the words, *heirs of body*, was not overcome by the other superadded words, taking into consideration the devise over.[1]

In *Doe* v. *Goffe*, (11 East R. 668,) the devise was to A, and the *heirs of her body*, begotten or to be begotten, as tenants in common, and not as joint tenants; but if such *issue* should die before twenty-one, then to B in fee. It was held that A took an estate for life only, with remainder to all her children equally, as purchasers. This decision also has been overturned upon the same ground as the preceding.[2]

In *Right* v. *Creber*, (5 Barn. & Cres. R. 866,) the devise was to trustees, in trust to permit A to receive rents *for life*, and from and after her death unto the *heirs of her body*, *share and share alike, their heirs and assigns for ever.* It was held, that A took an estate for life, and her children took as purchasers in fee; the estate to open to let in children born after the testator's death.

In *Jeffery* v. *Honywood*, (4 Madd. R. 398,) the devise was to A, and to all and every *the children*, whether male or female, of her body lawfully issuing, and unto *his, her, and their heirs*, as *tenants in common.* It was held, that A took for life only, with remainder to her children as tenants in common in fee. This case also is as nearly in point as can well be imagined. The estate to A is indefinite; the remainder is to the children in fee, as tenants in common, and there is no devise over; which are precisely the leading circumstances in the present case.

Now, I believe, that no case whatsoever will be found to have decided, that where the devise has been in terms to *children and their heirs*, without any devise over, the parent

[1] *Jesson* v. *Wright*, 2 Bligh R. 1. [2] 2 Bligh R. 1, 55, 57.

shall take an estate tail. Where the words of the devise have been to "*issue*," or "*issue of the body*," and *their heirs*, or *heirs of their bodies*, it has often been held, that the parent took an estate for life only. In addition to the cases already cited on this point, are *Backhouse* v. *Wells*, (1 Eq. Cas. Abrid. 184; *S. C.* 2 Str. R. 731, 800.) *Mandeville* v. *Lackey*, (3 Ridg. P. C. 352.) *Merest* v. *James*, (1 Brod. & Bing. R. 484; *S. C.* 4 Moore R. 327.)

The great struggle has been, where the words have been "heirs of the body," with superadded words. The constant argument has been, that these words have a technical, appropriate meaning, as words of limitation, to designate heirs in succession, and that, therefore, they are to be construed as such, unless the context clearly establishes, that they are used in a different sense, and as synonymous with children. Words inconsistent with the technical meaning are not, (it has been said,) sufficient to overthrow it; but there must be a clear expression of intention by the testator to use them as descriptive of particular persons, and not merely as descriptive of a succession of heirs.

Let us now proceed to examine some of the most important cases, which are favorable to the defendant; and it will be found, that they turn upon the same ground of reasoning.

The first, and indeed that, which may now be deemed the great leading authority on this head, is *Jesson* v. *Wright*, (2 Bligh R. 1.) There, as we have seen, the devise was to A for life, and after his decease to *the heirs of his body*, in such proportions as he should by deed appoint; and, for want of such appointment, to the *heirs of the body of A*, share and share alike, as tenants in common; and if but one child, the whole to such child, and for want of *such issue*, to the heirs of the testator. The House of Lords held, that under this devise A took an estate tail. Lord *Eldon* founded his

judgment upon the ground, that the words, to A *for life*, followed by the words, *heirs of his body*, would give a fee tail, if the will had stopped there. He argued, that the words might yield to a clear particular intent, that the estate should be for life only; and that such may be the effect of superadded words, or any expressions showing the particular intent of the testator; but it must be clearly intelligible and unequivocal. And he thought, that no such intent was clearly and unequivocally shown in the superadded words. On the contrary, he thought, that the words, "for want of such *issue*," showed, that the issue were to take in succession, that is, as heirs of the body, and not as a mere description of the persons, who were children; and that children alone were not the objects of the testator's bounty, but other issue. Notwithstanding, therefore, the other superadded words, "as tenants in common," &c., the general intent must prevail over the particular intent. Lord *Redesdale* put this judgment upon the ground, that the technical words, "heirs of the body," should have their legal effect, unless from subsequent inconsistent words, it is very clear the testator meant otherwise. He thought by heirs of the body, the testator did not mean exclusively children, but that there were other objects of his bounty.

Now, it is material to state, that in this case the devise to the "heirs of the body," had no superadded words of limitation to them in fee; so that, if it meant children, they would take for life only. And *Patteson* J., in *Doe* v. *Featherstone*, (1 Barn. & Adolp. R. 944,) which was decided expressly upon the authority of *Jesson* v. *Wright*, and as not distinguishable from it, took notice of the difference between it and *Right* v. *Creber*, (5 Barn. & Cressw. R. 866,) where there were superadded words of fee, to the words, "the heirs of the body," which led to a different view of the intention. In

Doe v. *Featherstone*, the devise was to the testator's son-in-law A, and B his wife, for their lives and that of the survivor, and immediately after the survivor's decease, then to the *heirs of the body* of B by A, *to be equally divided among them, share and share alike.* It was held, that B took an estate tail, although there was no devise over in default of issue, as in *Jesson* v. *Wright*, the Court thinking, that the general intention was not displaced by the inconsistent words.

In *Franklin* v. *Lay*, (6 Madd. R. 258,) the devise was to A, and the *issue of his body* lawfully to be begotten, and to the heirs of such issue for ever; but if A should die without leaving any issue, then remainder in fee over. It was held by the Vice-Chancellor, that A took an estate tail, for the words, "leaving issue," could not be restrained to mean issue living at A's death, but meant an indefinite failure of issue, which would clearly indicate an estate tail in A. Now, it may be added, that "issue" is generally construed to include descendants, unless the contrary be the testator's intention. Sir William *Grant* recognised this, as the settled rule in *Leigh* v. *Norbury*, (13 Ves. R. 339.)[1] But the reverse is the rule, as to the word "children," for they are construed as descriptive of persons, or words of purchase, unless the contrary clearly appears to be the intention of the testator.

The same remarks are applicable to *King* v. *Mellings*, (1 Vent. R. 225, 232; *S. C.* 2 Lev. R. 58); *Roe* v. *Grew*, (2 Wilson R. 322); *Shaw* v. *Weigh*, (1 Eq. Ab. 184); *King* v. *Burchell*, (1 Eden. R. 424; *S. C.* Ambl. R. 379);

[1] See *Roe* v. *Grew*, 2 Wilson R. 322. *Shaw* v. *Weigh*, 1 Eq. Ab. 184. *King* v. *Burchell*, 1 Eden R. 424. *Denn* v. *Puckey*, 5 T. R. 299. *Frank* v. *Stovin*, 3 East R. 548. *Doe* v. *Applin*, 4 T. R. 82. *Stanley* v. *Lennard*, 1 Eden R. 87. *Doe* v. *Halley*, 8 T. R. 5.

Denn v. *Puckey*, (5 T. R. 299); *Frank* v. *Stovin*, (3 East R. 518); *Doe* v. *Applin*, (4 T. R. 82); *Attorney-General* v. *Sutton*, (1 P. W. R. 754); *Stanley* v. *Lennard*, (1 Eden. R. 87); and *Doe* v. *Halley*, (8 T. R. 5.) In all of them there was a devise to A generally, or for life, and to his "issue," with superadded words, and *in default of issue*, a devise over. The devise over is not always decisive, as we have seen; but it often has had a most material influence.

In *Goodright* v. *Pullyn*, (2 Ld. Raym. R. 1437; *S. C.* 2 Str. R. 729,) the devise was to A for life, and after his decease to the *heirs* male of the body of A, lawfully to be begotten, and his heirs for ever; but if A should die without such heir male, then remainder over. It was held, that A took an estate tail. The Court mainly relied upon the ground, that the words *heirs male* are *nomina collectiva*, words of limitation, and not of purchase, and that the word "his" referred, not to heirs male, but to A. *Wright* v. *Pearson*, (1 Eden. R. 119; *S. C.* Ambler R. 358,) is precisely to the same effect.

In *Morris* v. *Ward*, (cited 8 T. R. 518,) the devise was to A for life, and after her decease to the *heirs of her body*, begotten or to be begotten, and to his or *her heirs* for ever, and for want of such heirs of the body to the testator's next heirs, and their heirs for ever. It was held an estate tail in A. This case also turned upon the force of the words, "heirs of the body," in a technical sense. *Measure* v. *Gee*, (5 Barn. & Ald. R. 910,) is precisely to the same effect.

In *Doe* v. *Smith*, (7 T. R. 527,) the devise was to A, and the heirs of her body, lawfully to be begotten, as tenants in common, and not as joint tenants; and in case A shall happen to die before twenty-one, or without leaving issue, then devise over. It was held, that A took an estate tail, upon the ground of effectuating the general against a particular in-

tent, the general intent being, that the issue of A should take in succession, evinced by the words, "heirs of the body," and also by the language leading to the devise over. Lord *Kenyon*, on that occasion, distinguished the case from *Doe* v. *Laming* by remarking, that there were no words of limitation superadded to the "heirs of the body" of A. Now, such words are in the case at bar. *Doe* v. *Cooper*, (1 East R. 229,) where the words were "issue of A," turned upon precisely the same considerations; as also did *Pierson* v. *Vickars*, (5 East R. 548.)

In *Bennett* v. *Tankerville*, (19 Ves. R. 170,) the devise was to A for life without impeachment of waste, and from and after his decease to the *heirs of his body*, to take as tenants in common, and not as joint tenants; and in case of his decease without issue, devise over. It was held an estate tail in A. Here, again, the technical words, "heirs of the body," occurred without any superadded words, "to their heirs," and there was a devise over on a failure of issue.

In *Doe* v. *Goldsmith*, (7 Taunt. R. 209; *S. C.* 2 Marshall R. 517,) the devise was to A for life, and immediately after his decease to the heirs of his body lawfully to be begotten, in such parts, shares, and proportions, &c., as A should appoint, and in default of such heirs of his body, devise over. It was held a fee tail in A, upon the same general grounds, as the preceding cases. Here, there was a devise over in default of issue; and there were no superadded words to the words, "heirs of the body" of A.

In *Doe* v. *Harvey*, (4 Barn. & Cressw. R. 610,) the devise (of gavelkind land) was to A for life, and from and after the determination of that estate to trustees to preserve contingent remainders, and from and after the decease of A to and amongst all and every the heirs of the body of A, as well female as male, such heirs, as well female as male, to take as

tenants in common; and for default of such issue, devise over. It was held a fee tail in A. The ground of the decision was the same as in the preceding cases, upon the technical force of the words, "heirs of the body," and the general intention, namely, that the intention was, that the estate should remain in the family of A, as long as the family should exist. This could be effected only by construing the words, "heirs of the body," to be words of limitation. If construed to be words of purchase, and all the children of A should die in his life-time, leaving issue, the latter could not take. And besides; there being no superadded words of limitation to the words, "heirs of the body," it would be difficult to say, that the children of A could take more than an estate for life. The decision of *Jesson* v. *Wright* had also manifestly great weight in this decision.

These are the most material cases, which can be urged as favorable to the defendants. They may be dismissed by remarking, that they all differ from the case at bar, in having the devise, after the estate to the first taker, to be in the technical words, "to heirs of the body," or "to the issue" of the first taker; and if there are superadded words, there is also a devise over on failure of issue. In the case at bar the devise is to Philip Sisson, and to his *male children*, (not to the heirs of his body, or his issue;) there are the superadded words, "their heirs for ever, to be equally divided amongst them;" and there is no devise over. If, under such circumstances, the estate is construed to be an estate tail in Philip Sisson, then, as there is no devise over, and no residuary clause in the will, the testator has failed to do, what he expressly states his intention to be in the beginning of his will, to dispose of all his worldly estate.

Indeed, the whole reasoning, on which this class of decisions is founded, when rightly understood, applies with great

force to the opinion, which I have already expressed, on the true interpretation of the present will. The leading ground is, that words, which have a known technical meaning, or general use, as words of limitation, indicating heirs in succession, shall not be presumed to be used in any other sense, unless there is clear and unequivocal evidence, that a different sense was absolutely intended. Inconsistent words used do not necessarily import such an intention; for the testator may still use the words to denote heirs in succession, and mean to accomplish other objects incompatible by law with that intention. Apply the same ground of reasoning to the present case. The word "children" is in a technical, as well as a general sense, used as a word of purchase, as a description of persons, and not as a word of limitation.[1] If another meaning is sought to be forced upon it in a particular will, deflecting it from its general and appropriate sense, that must be made out by clear and unequivocal evidence. In the case at bar, no such unequivocal evidence exists. On the contrary, every part of this clause of the will reads consistently, and full effect is given to every word in it by adhering to the technical and general sense. A departure from that sense involves the rejection of important words in that clause, sensible in the place where they occur, and indicative of a legal intention.

There are stronger cases than the present, where the general sense has prevailed. In *Bates* v. *Jackson*, (2 Strange R. 1172; *S. C.* 7 Mod. R. 439,) the devise was to A for her life, and after her death to my daughter B, and her children of her body begotten, or to be begotten by her husband C, and *their heirs for ever*. B at the time of making the will

[1] See *Doe* v. *Mulgrave*, 5 T. R. 320. *Seale* v. *Barter*, 2 Bos. & Pull. R. 485. *Ginger* v. *White*, Willes, R. 348.

had one child, and afterwards had three more. It was held, that B took, as joint tenant in fee, with all her children. And Co. Litt. 9 was relied on, that a gift to B, *et liberis suis et a lour heirs*, is a joint fee to B and his children. Now, whether it might not have been a more just construction of the will in 2 Strange R. 1172, to have held it an estate to B for life, with remainder in fee to her children, I do not stop to inquire. It is sufficient, that it was not held to be an estate tail in B. The case of *Jeffrey* v. *Honywood*, already cited, (4 Madd. R. 398,) is still more direct, and is certainly far more satisfactory. *Crawford* v. *Trother*, (4 Madd. R. 361,) leads in the same direction, as far as it goes.

Upon the whole, I can find no case, which goes the length of establishing the correctness of the construction of this will contended for by the defendants; and to adopt it, would, in my judgment, be to overthrow the clear and positive intention of the testator. On the other hand, there are, as I think, decisive authorities in favor of construing the estate of Philip Sisson to be a life estate only, with remainder in fee to his male children, under circumstances far less strong, than those belonging to the present case.

And I would add, that, in all cases of this sort, if the intention be clear, no authorities, applicable to other wills, ought to preclude the Court from carrying that intention into effect, if it can be done without disturbing the settled principles of law.

My opinion is, that the plaintiffs are entitled to recover, unless the warranty in this case is a rebutter or estoppel of their claim.

This leads me to the consideration of the question of the effect of the warranty. If the statute of 4th and 5th Anne, ch. 16, upon the subject of collateral warranty, has been adopted in Rhode Island, it puts an end to the question. In February, 1749, the Legislature of Rhode Island passed an

Act, reciting in the preamble, that a Committee had been appointed at a previous session to prepare a bill for introducing into the Colony such of the Statutes of England as are agreeable to the constitution, and to make a report of their doings, and that the Committee had presented a Report, (reciting the Report at large,) and therefore enacted, "that all and every of the Statutes aforesaid, (that is, the Statutes referred to in the Report,) be and they are hereby introduced into this Colony, and shall be in full force therein, until the General Assembly shall order otherwise." The Report referred to begins as follows: "We the subscribers, being appointed to report, what Statutes of Great Britain *are* and *ought to be* in force in this Colony, do report as followeth, that the following Statutes, namely, the Statute of Merton concerning dower; the Statute of Westminster the first, as far as concerns bail; Gloucester; Westminster the second, *de donis conditionalibus*; first Henry the Fifth, ch. 5th, of additions; partitions in general; the Statutes of Henry the Eighth, concerning leases, saving and excepting the last paragraph of the said Statute; twenty-first of James First, ch. 16th, for limiting real actions; and that of thirty-second of Henry the Eighth, ch. 2; the Statutes of James and Elizabeth, and all other Statutes that concern bastardy, so far as applicable to the constitution of this Colony, &c., &c.; the Statute of twenty-seventh Henry the Eighth, commonly called the Statute of Uses;" and, (after enumerating several other Statutes in the same general way,) adds "*the Statute of the fourth and fifth of Anne, ch.* 16, *relating to joint tenants and tenants in common;* that part of the Statute of the —— of Anne, that subjects lessees that hold over their term against the will of the lessor, to the payment of double rent during the time they hold over," &c., &c. And then concludes, "All which

Statutes, we are humbly of opinion, have *heretofore been*, and still ought to be, in force in this Colony." The language of this Report is extremely loose and inaccurate. But it is observable, that the words descriptive of the particular Statutes are not their exact titles, but rather those, by which they were commonly known; and where a part of the Statute only is intended to be adopted, and a part excluded, that intention is expressed in positive terms.

In the Revision of 1767, (p. 55,) the introductory enactment is, "that all the Courts in this Colony shall be held to, and governed by, the Statutes, Laws, and Ordinances of this Colony, and such Statutes of Parliament as are hereinafter mentioned, that is to say," — and it recites the same Statutes in the very terms of the Report of 1749.

The Statute here described, as "the Statute of the fourth and fifth of Anne, ch. 16th, relating to joint tenants and tenants in common," is intitled "An Act for amendment of the Law and the better advancement of Justice." It contains a great variety of sections, among which are provisions for allowing double pleas, extending the Statutes of *Jeofails*, authorizing a view by juries, dispensing with attornments by tenants, regulating dilatory pleas, allowing a plea of payment *after the day* to bonds, and stay of proceedings on payment of principal and interest, fixing the competency of witnesses to nuncupative wills, providing for declarations of uses upon fines and recoveries *after* they are levied, limiting actions against persons beyond seas, regulating suits on bail bonds, providing against bars by collateral warranty, providing for costs to defendants in error, and finally, in the last (the 27th) section, for actions of account by one joint tenant, or tenant in common, his executors or administrators, against another joint tenant, or tenant in common, his executors or adminis-

trators; and also an action of account against the executors or administrators of every guardian, bailiff, or receiver; neither of which lay at the common law.[1]

Now, it is not unimportant, that the Committee in their Report state, that the Statute of Anne and the other Statutes referred to, have heretofore been in force in the Colony. And it would certainly require very strong language to induce the Court to believe, that a Statute professedly in "amendment of the law and for the advancement of justice," and which, in most of its provisions, was directly applicable to the Colony, was not intended to be generally adopted. The words "relating to joint tenants and tenants in common," are descriptive of the Statute generally, and do not import in the connexion, in which they stand, that the part, which relates to joint tenants or tenants in common, and no more, is or has been adopted. If it had been the intention of the Committee or of the Legislature, thus to restrain the adoption of the Statute, the same language would have been used, as in other parts of the Report, where such an intention existed. Thus, the Statute of Westminster the first is adopted "*so far as concerns bail*"; the Statute of thirty-second Henry Eighth, concerning leases, *excepting* the last paragraph; *that part of the Statute of —— Anne* respecting tenants holding over, &c., &c. Indeed, it seems almost incredible, that the Committee, or the Legislature should have intended to adopt that part only of the twenty-seventh section of the Statute, which gives an action of account between joint tenants and tenants in common, and yet have left out that part of the same section, which gives an action of account against the executors and administrators of guardians, bailiffs, and receivers. And

[1] Com. Dig. *Accompt* B. D. *Webber* v. *Horne*, Willes R. 208. Co. Litt. 172.

yet this would be the inevitable result of giving a construction to the language of the Report, which should consider the words as restrictive, instead of being descriptive of the Statute. It would be far more incredible, that there should be an intention to adopt this comparatively unimportant part of the Statute of fourth and fifth Anne, ch. 16, to the total neglect and exclusion of the other numerous and infinitely more important provisions for the amendment of the law and the furtherance of justice contained therein. The doctrine of collateral warranties, for instance, which this Statute cuts down, is one of the most unjust, and oppressive, and indefensible in the whole range of the common law; and, in a country like ours, would daily work the greatest public mischiefs. Collateral warranty is, as every lawyer knows, where the ancestor has made a warranty of land, which warranty, upon his death, descends upon the heir, whose title to the same land neither is, nor could have been, derived from the warranting ancestor. And yet, though no assets should descend to the heir from that ancestor, and though the heir's title to such land should be otherwise complete, he would be barred of his title by the warranty of his ancestor. Thus, a tenant for life by the curtesy might aliene the land with warranty, and by this warranty, descending upon his son, might without assets bar him of his maternal inheritance. This was cured by the very Statute of Gloucester, (6 Edw. I. ch. 3,) referred to in the Report, as to tenants by the curtesy, and by a later Statute as to tenants in dower. But it remained a standing reproach upon law and justice, until the Statute of fourth and fifth Anne applied the same rule to all other tenants for life.[1] Surely, this was a grievance of a far more weighty nature, than the mere defect of a remedy for an account between joint tenants and tenants

[1] 2 Black. Comm. 302, 303.

in common, in cases where they had not been made bailiffs. It appears to me, therefore, that as the language of the Report, taken in connexion with the legislative enactment, is, that the "Statutes of fourth and fifth Anne, ch. 16," are adopted, it would be a most unjustifiable interpretation for the Court to say, that the chapter sixteenth was not adopted; but only a fragment of a single section of the Statute. My opinion is, that the Legislature adopted the whole Statute, so far as it was, or could be, applicable to the Colony.

This disposes of the question of warranty, and thus removes the only remaining ground against the plaintiffs' right to recover. I will only add, in reference to a point made at the argument, that the covenant of warranty, though it is deemed a personal covenant in this country, and may not authorize a recovery over of the value from the heir, if he has assets, in a *warrantia chartæ*, but only in an action of covenant; yet that does not prevent the covenant of warranty from operating as a bar to the title of the heir by way of rebutter, when it descends upon him from the warranting ancestor.[1]

The District Judge concurs on this opinion, and judgment must be given accordingly.

BELA J. STODDARD AND OTHERS *v.* ENOS GIBBS.

In Rhode Island a husband is not entitled to a life estate, as tenant by the curtesy of any remainder or reversion owned by his wife, but only of real estate, of which she has an actual seisin, and possession in fee.

TRESPASS and ejectment for certain land in Portsmouth, in the State of Rhode Island. Plea, the general issue. At the trial in June Term last, the jury found a special verdict.

[1] See *Doe* v. *Prestwidge*, 4 Maule. & Selw. R. 178.

The substance of it was, that the plaintiffs were entitled to three fifths of a moiety of the demanded premises, as heirs at law of their mother, Eliza Gibbs, the wife of the defendant, who died in 1820, seised (as the heir of her mother) of a moiety of the reversion of the demanded premises, which were at the time of her death in the actual possession of her father, Peleg Thurston, who was tenant by the curtesy thereof, and who died afterwards, in December, 1831. The defendant claimed a life estate on the demanded premises, as tenant by the curtesy upon the death of his wife, the mother of the plaintiffs.

The cause was argued by *Hunter* for the plaintiffs, and by *Cranston* and *Hazard* for the defendant.

Hunter, for the plaintiffs, in opening said, that the special verdict in this case presents but a single point, and that is, whether a husband can be a tenant by the curtesy, in a case where his wife had no seisin of the estate, to which it is agreed she was entitled as reversioner. It is submitted, that at common law there cannot be a doubt, that Enos Gibbs, the defendant, cannot be a tenant by the curtesy; for that requires actual seisin by the wife. In this case Gibbs' wife never had even a seisin in law. Cruise Dig. vol. 1. p. 140; Ib. 124; Co. Litt. 1. 550. The husband in right of his wife never had possession, nor was either of them entitled to the possession. On the death of Peleg Thurston, the grandfather, in 1831, the right of entry to the reversionary interest commenced. *Wallingford* v. *Hearl*, 15 Mass. R. 471. The seisin of the wife must be an actual *seisin*, that is, *possession* of the lands; a man shall not be tenant by the curtesy of a remainder or a reversion. 2 Black. Comm. ch. 8, ; see Bacon's Ab., Gwillim's Ed., vol. 2, p. 223; Watkins, 36, 111. The Statute of Rhode Island does not alter the common law; it only repeats and affirms it. Rho. Is. Dig. p. 227,

§ 8. Dane, vol. 4, p. 657, cites the most and the best of the authorities. His conclusion is, there can be no tenant by the curtesy of a right, nor of a seisin in law, nor of a reversion or a remainder in a freehold. The words of the Rhode Island and of the Massachusetts Statute of March 9th, 1784, are identical. In the analogous case of dower, Rhod. Is. Dig. p. 188, an *actual corporeal* seisin, or a right to such seisin in the husband during the coverture, is indispensable to entitle his widow to dower, and a legal seisin of a vested remainder or reversion is not sufficient for that purpose. *Eldredge et al* v. *Forrestal et ux.*, 7 Mass. R. 253. A widow is not entitled to dower in the reversion expectant on the determination of a life estate, where the husband dies before the tenant for life. *Williams* v. *Amory*, 14 Mass. R. 20–27; and see *Cook* v. *Hammond*, 4 Mason R. 486.

For the *defendant* it was argued, that estates by the curtesy are governed by the same law in the States of Connecticut and Rhode Island. In the former State, it has been decided and settled by the highest judicial tribunal, that "seisin in the wife is not necessary to entitle the husband to the estate by the curtesy." Reeve's Domestic Relations, pp. 33–35; 4 Day R. 305. In the case there reported, the Court say, "that our system of law respecting real property, is in many instances very different from the English system." "Seisin is necessary in their law, and ownership is sufficient in our law." "Since seisin is not necessary in case of descent to heirs, nor to pass lands by devise, why should it be necessary to the husband's title by the curtesy?" The decision of the Court in this case is no departure from fixed rules and precedents. The English law respecting the efficacy of seisin has long been departed from, and to adhere to it in this case would mar the symmetry of our law." In the same case, the Court observe, that these Statutes of limita-

tion respecting lands, have always been construed in conformity to the same principle, whilst the same words in the English Statute have been construed, not as having any effect on the title, but only on the right of entry." A case reported by Judge Reeve, (Domestic Relations, 35,) appears to be exactly in point. A devised lands to his executors for payment of his debts, until his debts were paid. The executors entered. B, his daughter and sole child, married C and by him had a living child; she died while the estate was in possession of the devisee's executors. The Court decided, that C, the husband, was entitled to the curtesy. *Dane*, (Abridgment vol. 4, cap. 130, art. 4, § 30, p. 663,) title *Estate by Curtesy*, recognises the foregoing, as the settled law in the State of Connecticut. Our system of law respecting real property we consider to be the same. The same construction is put upon our Statute of limitations; and we know of no instance in which any doctrine has been advanced different from that expressed in the cases above referred to.

Hunter in reply: Our law in respect to curtesy is the law of Massachusetts and of all the other States of the Union, (Georgia, Vermont, and Connecticut perhaps excepted.) It is substantially the common law, the law of England. Referring to the authorities already produced, what doubt can there be as to that law? With great submission, the Connecticut decision is a mistake. The dissentient judges, (4 Day R. 305,) were in the right. They did not assign their reasons *in extenso*, but they might be assigned by a true common law lawyer, and this without trenching upon what appears to be the principle adopted by the majority of the Connecticut Court, namely, that ownership is the principle of the American law, as contradistinguished from seisin. With that principle in all its bearings, I have now nothing to do. It may be, as a generality, true; but there are exceptions. Curtesy is not the

creature of feudality. It existed anterior to it, and has continued in a great degree independent of it. The feudal maxim, *Non jus sed seisina facit stipitem*, may be enforced in England, or abrogated in America, and yet the seisin of the wife continue to be the indispensable requisite of the curtesy of the husband. He is preëminently tenant by the curtesy of England, and so far as regards the *Norman* of "unconquered and unfeudalized England" for the reason assigned by *Littleton*, because this is used in no other realm, but in England only. The root of the doctrine of curtesy is in a rescript of Constantine. It is one of the few unmutilated monuments of Roman jurisprudence. Dower is probably of Danish origin, and both curtesy and dower are distinct from the doctrine of feuds, and in a great degree opposed to it. See Sir Martin Wright on Tenures, 194; Feud. Lib. 1, tit. 15; Woddeson's Lect., vol. 2, 18; 2 Black. Com. 126, Christian's Note. An actual entry, or *pedis positio*, in certain cases, may not be necessary; but the exceptions prove the general rule, and the present is an abstract case, unmarked by any peculiarity, arrogating no exemption, seeking refuge in no exception. *Bickman* v. *Sillick*, 8 John. R. 262. As contradistinguished from curtesy, *seisin in law* is sufficient for dower; the wife is presumed to have no power of obliging her husband to take possession, it is therefore holden in her favor, that the right to the immediate possession is equivalent to his actual possession. *Doe* v. *Hutton*, 3 Bos. & Pul. R. 643. Even on the supposition, that this distinction does not exist, and that the intention is to harmonize the law of dower and curtesy, the words of the Rhode Island Statute being in both cases the same; yet nevertheless, in the case at bar, the special verdict shows, that there was at no time, during the life of the *feme*, a right to possession. There was not even seisin in law. The mother of the present plaintiffs was entitled to

a reversion in fee, out of which a freehold interest was carved, namely, the life curtesy estate of her own father; she had therefore not even a seisin at law, much less an actual seisin. Curtesy is an estate, *uxore juris.* In this case, events obstructed and literally prevented an estate, an ownership in the wife. What could the husband take and enjoy, when there was nothing for the wife to take and enjoy? 1 Roll. Ab. 674; Co. Litt. 32; *Barreston* v. *Hay*, Cro. Eliz. R. 415; Wingate's Maxims, 581. Where there is an intermediate freehold estate, there is no seisin either actual or legal. At common law the death of the owner of the remainder, or the expectant reversion, during the continuance of the life or other estate, prevented his possession and enjoyment. He had nothing, and of course transmitted nothing. *Jackson* v. *Henderson*, 3 John. Cas. 214; *Peters* v. *Schoeder*, 13 John. R. 260. But there is a more general, perhaps a more philosophical view that may be presented. It may be sneered at as pedantic or far sought. It however relieves the law of curtesy from the opprobium of being obstructed in its beneficent tendency, by what is deemed by some to be an obsolete or inapplicable principle of feudal law. To know how much of the law of feuds was adopted in England, and from which of its tenures, we must resort to the law of feuds. *By that law the husband did not succeed to the wife's feud.* The curtesy of England therefore does not depend on the feudal law, but on the rescript of Constantine, — in truth, on the civil law. That law is in general founded on the law of nature, that is, on general ethical fitness, — certainly not on a system in most respects artificial and peculiar, and in some barbarous and absurd. Now what is the general tendency of the rescript of Constantine, in regard to marital rights? It may be answered, that it is in conformity to the most sagacious moral conclusions. The rights of the husband had reference

to his actual prosperous duties and enjoyments. If he had living children, and his wife had an estate, of which he enjoyed the use, rents, and profits, of that estate he was not to be deprived by the death of his wife. Because an accustomed enjoyment was not to be altered or diminished; because a vested interest was not to be destroyed; and because it is more fit that the father should be independent of the insolent heir, (using the word *insolent* in its primitive Latin civil-law sense, — unused to, — *in soleo*,) than that heir of the father. It is easy to find traces of these thoughts in the earliest reports and abridgments, though the true source is not always disclosed, from which they flowed. They all in substance concur in saying, it would be cruel to take from the husband that estate, rank, or condition he had possessed or enjoyed with his wife. If he had not so enjoyed it, there was no deprivation and no cruelty, and the children, who are by law and nature entitled, may justly, equitably, and immediately occupy and enjoy. Though perfectly sincere on this point, I dare not pursue it. It is presumptuous to attempt to be rational in the argument of a strict point of common law, in an action of ejectment.

From the mutation of human affairs, and the direction of the artificial forms of modern society in England, the instances both of curtesy and dower recur a hundred-fold oftener in this country than now in England. Without abandoning therefore the true, perhaps stern doctrine of the common law, we say, that, if the Statutes of Rhode Island and Massachusetts mean that the seisin should be alike in dower and curtesy, and thus so far alter the common law, the case at bar presents the occasion, if need be, for this being so said. The plaintiffs are then protected and entitled. Reverse the case, and call it dower, could the wife possess that which the

husband never did possess, nor could in his life-time claim for the purpose of possession?

STORY J. There is but a single question in this case, and that is, whether in Rhode Island a husband is entitled to a life estate, as tenant by the curtesy, of land of which his wife was in her life-time seized in fee in reversion.

If this question were to be decided by the common law, it would not admit of controversy. Nothing is better settled in that law, than that there can be no curtesy of a remainder or reversion. Mr. Justice *Blackstone*, in his Commentaries, (2 Black. Comm. 127,) lays it down as one of the elements of the common law. "There are (says he) four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion." And this language is fully borne out by Lord *Coke*, in his Commentary on Littleton.[1]

Now, the common law was expressly adopted by a Statute of Rhode Island, as early as the year 1700, as the rule in all cases, where no particular colonial law existed on the subject.[2] Of course the common law must prevail, unless there is some statutory provision, which has since that period intercepted or varied its application.

Let us see, then, whether any such provision exists. By the Statute of descents of Rhode Island, (1798, 1822,) it is enacted, that "when a man and his wife shall be *seised of any*

[1] Co. Litt. 29.

[2] Rhode Island Colony Laws, (1744,) p. 28.

real estate in her right in fee, and issue shall be born alive of the body of such wife, that may inherit the same, and such wife shall die, the husband shall have and hold such estate during his natural life, as tenant by the curtesy."[1] Now this description of a tenant by the curtesy is in substance the same, which *Littleton* (§ 35) has given of a tenant by the curtesy at the common law: "Tenant by the curtesy of England, (says he,) is where a man taketh a wife *seised in fee simple*, or in fee tail, &c., and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England." Now, my Lord *Coke*, commenting on this very passage, says, that the words, "seised in fee," mean a seisin in deed, not a seisin in law; and therefore a man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture.[2] So that it is clear, that the words, "seised in fee," do not necessarily, in the language of the law, import a seisin in deed, that is, a present estate in fee in possession. Now, since the rule of the common law was not only well known, but had been adopted in Rhode Island, it would be natural to expect, if the Legislature intended to modify or repeal it, that some language would be used, which should unequivocally, and in terms susceptible of no doubt, express that intention. In such a case we should not expect to find the very language used, which the most accurate writers upon the common law were accustomed to use, to express the very rule of that

[1] Rhode Island Laws, Digest, 1822, p. 227, § 8.

[2] Co. Litt. 29. See Cruise's Dig. tit. 5, ch. 1, § 1, pp. 159, 160.

law.[1] Would it be safe for any Court to adopt an interpretation, abolishing the common law rule, upon so loose a foundation?

The Statute of Massachusetts respecting tenancy by the curtesy, is in precisely the same terms, as that of Rhode Island; and probably the latter was borrowed from the former.[2] The uniform interpretation of the Massachusetts Statute has been, that it does not vary the rule of the common law.[3] This is strong evidence to show, what the fair interpretation of the terms is; or, at least, it shows, that the language reasonably admits of an interpretation consistent with the rule of the common law, and in affirmance of it.

The language of the Rhode Island Statute respecting dower, uses terms nearly the same. It declares, that the widow shall be endowed of one third part of the lands, &c., "whereof her husband, or any other to his use, *was seised of an estate* of inheritance at any time during the coverture."[4] Yet, I presume, it was never contended, that this applied to a seisin in law, such as a seisin of a reversion or a remainder.

But it is said, that in the State of Connecticut the doctrine has been settled upon solemn argument, that actual seisin in the wife during the coverture, is not necessary to entitle the husband to a tenancy by the curtesy in her estate. That certainly was the doctrine of the majority of the Court in *Bush* v. *Bradley*, (4 Day R. 298, 305,) and is probably

[1] Littleton, § 3. Cruise Dig. tit. 5, ch. 1, § 1, pp. 159, 160. Bac. Abridg. *Courtesy*, C. 2. Com. Dig. *Estate*, D. 1. Dane's Abridg. ch. 130, art. 3, § 1. *Buckworth* v. *Thirkell*, 3 Bos. & Pull. R. 652, note.

[2] See Act of 9th March, 1784. Stat. 1783, ch. 36.

[3] Dane Abridg., ch. 130, art. 3, § 1, 2, 3.

[4] Rhode Island Laws, Digest of 1822, p. 188.

now deemed the settled law of that State.[1] But it is observable, that the decision in that case was not founded upon any positive language of the Legislature, directly applicable to the case. There was no Statute of Connecticut, which called for any interpretation by the Court. The doctrine was avowedly founded upon analogies furnished by the local law of the State. It was said, that the Statute of limitations of Connecticut in its terms did not take away the title of the original proprietor, but only tolled his right of entry; and yet that it had always been construed to bar all claim of title; while the same words in the English Statute had been considered as having no effect whatever upon the title, but only upon the right of entry. It was also said, that actual seisin was not necessary in cases of descents or devises; but that it was sufficient, that there was a right of property. And if not necessary in such cases, the question was asked, why should it be thought necessary to the husband's title by the curtesy? And the conclusion, to which the Court arrived, was, that the English law respecting the efficacy of seisin had long since been departed from in Connecticut, and to adhere to it in the case of the curtesy would mar the symmetry of the law of that State.

Now, however satisfactory this reasoning was to the learned judges, who decided this case, it has not been deemed equally satisfactory to other learned judges in other States, where the local jurisprudence furnished, in whole or in part, similar analogies. They have held, that the common law rule must prevail, until altered by the Legislature; and that they were not at liberty to imply such a repeal upon mere analogy. This doctrine is, *à fortiori*, to be followed in Rhode Island; for, the common law having been adopted by Statute in that State,

[1] Reeve's Domestic Relations, pp. 33-35.

nothing short of a legislative repeal, either express or necessarily implied, could justify any court of justice, sitting in that State, in an abandonment of it. Now, I confess, that I see not the slightest reason for supposing, that the Legislature, in the Statute already cited, had the least intention to repeal the common law in regard to tenancy by the curtesy. The language of the Statute is merely affirmative, leaving what is intended by the words, "seised of any real estate," &c., to be ascertained upon the sound rules of interpretation applied to similar cases. It is a general rule of construction, not to presume the common law repealed by a Statute, unless the language naturally and necessarily leads to that conclusion. Besides, though the language is not inconsistent with a larger intent, yet the subsequent words, "the husband shall *have* and *hold* such estate during his life," more naturally apply to a present possessory estate, than to one, which may never fall into possession during his life.

The Connecticut law, however, cannot apply to the present case; and indeed is repugnant to the Statute of Rhode Island. By the decision alluded to, it is not necessary, that the wife should have any seisin, either in law or fact, of the estate, to give her husband an estate by the curtesy. In the very case decided, she was actually disseised at all times during the coverture; and yet her husband was held entitled, as tenant by the curtesy. Now, the Statute of Rhode Island positively requires a *seisin* in the wife during the coverture.

Nor, indeed, in another view, is the Connecticut decision in point. There the wife had a present estate, of which she was, though disseised, entitled to a present possession. No question arose as to curtesy of a reversion or remainder. How that question would have been decided, if it had arisen, this Court have no means of ascertaining.

I cannot agree with one remark of the counsel for the

plaintiff in the present case, that Eliza Gibbs, the mother of the plaintiffs, was not seised in law of the estate, because she had only a reversion therein, after the tenancy of her father by the curtesy should expire. My opinion is, that there can, technically speaking, be a seisin in law of a reversion, though not in deed; and that such was her predicament. She was, in the strictest sense of the terms, seised of the reversion.[1]

Upon the whole my opinion is, that the plaintiffs upon the special verdict are entitled to recover their purparty, as heirs of their mother, Eliza Gibbs.

The District Judge concurs in this opinion, and judgment is to be given accordingly.

[1] See *Cook* v. *Hammond*, 4 Mason R. 488, 489. Plowden R. 191.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1833, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

WILLIAM ALLEN *v.* JOSEPH MCKEEN.

A college, merely because it receives a charter from the government, though founded by private benefactors, is not thereby constituted a public corporation controllable by the government; nor does it make any difference, that the funds have been generally derived from the bounty of the government itself.

The visitatorial power is a mere power to control and arrest abuses, and to enforce a due observance of the Statutes of a charity; it is not a power to revoke the gift, to change its uses or to devest the rights of the parties entitled to the bounty.

The visitatorial power is an hereditament founded in property, and valuable in the intendment of law; and where it is vested in trustees, there can be no amotion of them from their corporate capacity, and no interference with the just exercise of their authority, unless it is reserved by the Statutes of the foundation or charter. The trustees are, however, subject to the general superintendence of a Court of Chancery for any abuse of their trust.

Bowdoin College is a private, and not a public, corporation, of which the Commonwealth of Massachusetts was founder, and the visitatorial and all other powers, franchises, and rights of property of the College are vested in the Boards of Trustees and Overseers, established by the Charter, who have a permanent right and title to their offices, which cannot be devested, except in the manner pointed out in the Charter. In the Charter of the College, (§ 16,) it is declared, that the Legislature "may grant further powers to, or alter, limit, annul, or restrain any of the powers by this Act vested in the said corporation, *as shall be judged necessary*

to promote the best interest of the College." Under this clause the authority of the Legislature of the State of Maine is confined to the enlarging, altering, annulling, or restraining of the powers of the corporation, and does not extend to any intermeddling with its *property*, or extinction of its corporate existence.

By the Act of Separation of Maine from Massachusetts, the powers and privileges of the President, Trustees, and Overseers of the College, are guaranteed under the charter, so that they cannot be altered, limited, annulled, or restrained, except by judicial process, according to the principles of law, unless that Act has been modified by the subsequent agreement of both States. Afterwards the Legislature of Massachusetts passed a Resolve, "That the consent and agreement of this Commonwealth be, and the same is hereby, given to any alteration or modification of the abovementioned clause or provision in said Act, relating to Bowdoin College, *not affecting the rights or interests of this Commonwealth*, which the President, and Trustees, and Overseers of the said College, or others having authority to act for said corporation, *may make therein*, with the consent of the Legislature of said State of Maine; and such alterations or modifications, made as aforesaid, are hereby ratified on the part of this Commonwealth." This resolve does not authorize the Legislature of Maine to make alterations in the College charter, which shall divert the funds of the founder from their original objects, or vest the visitatorial power in any other bodies, or persons, than the Trustees and Overseers, marked out in the original charter; and, *à fortiori*, it does not justify the transfer of these powers from the Trustees to any other persons not in privity with them.

According to the foregoing Resolve, the alterations and modifications are to be made by the Boards of the College, or by their agents, with the consent of the Legislature, and not by the Legislature, without their consent.

The terms of ratification in the foregoing Resolve, being *in præsenti*, it seems that they cannot be applicable to all possible alterations in all future times.

By the terms of the Act of Separation of Maine from Massachusetts, no modification of it can be made, except *by the subsequent agreement of the Legislatures of both States*. To effect this agreement, there must be a concurrence of the Legislatures of both States *ad idem*, that is, an express assent to some specific proposition. Therefore the Act of Maine of the 16th March, 1820, which was never responded to by the Legislature of Massachusetts, and which in its terms does not look to any antecedent Resolve of Massachusetts, (though the foregoing Resolve of Massachusetts was passed four days previous,) but expressly looks to some future act or assent of Massachusetts, is not a sufficient compliance with the articles of separation.

By the Act of Maine of the 16th of June, 1830, it is enacted, that "the President and Trustees, and the Overseers of Bowdoin College shall have, hold, and enjoy their powers and privileges in all respects, subject, however, to be altered, restrained, or extended by the Legislature, &c., as shall, &c., be judged necessary to promote the best interests of said Institution." This cannot be construed to include an authority to annul the *charter*, or the corporation created by it, or the Institution itself, or to create new Boards, in whom the corporate powers and privileges may be vested; or to transfer to other persons the powers and privileges of

the old Boards; or to add new members to the Board by the nomination of the Legislature, or by that of the Governor and Council of the State. The Act of the 19th of March, 1821, enlarging the Boards, the Act of the 27th of February, 1826, making the Governor, *ex officio*, a member of the Board of Trustees, and the Act of the 31st of March, 1831, declaring, that no person holding the office of President in any college in the State, should hold his office beyond the day of the next Commencement of the college, and altering the tenure of their offices, are therefore unconstitutional.

Where the Boards voted, that they "*acquiesced*" in an Act of the Legislature, it was *held*, that this did not import an assent on their part; and, farther, that their approval could not give effect to an unconstitutional Act.

Where a person holds an office *during good behaviour*, with a fixed salary and certain fees annexed thereto, the tenure of the office cannot be altered without impairing the obligation of a contract. Therefore, the Act of the Legislature of Maine of 1831, removing President Allen from the office of President, and establishing a different tenure for the office, is contrary to the Constitution of the United States.

Where one man receives money, which ought to be paid to another, or belongs to another, an action of money had and received will lie in favor of him, to whom of right the money belongs; and this, notwithstanding it may involve a trial of the title to an office, if the party has once been in possession.

THIS was an action of Assumpsit for money had and received, brought by the plaintiff, who claimed to be President of Bowdoin College, against the defendant, who was Treasurer of the College, for the recovery of the salary and perquisites of the office of President of the College. The following is an outline of the material facts of the case.

Bowdoin College was established in Brunswick, in the present State of Maine, by an Act of the Legislature of Massachusetts, passed on the twenty-fourth day of June, 1794. The Act or Charter of Incorporation, after providing, that there should be erected and established a college, &c., to be under the government and regulation of two certain bodies politic and corporate in the Act mentioned, proceeds in the second section to enact, that certain persons, (naming them,) eleven in number, together with the President and Treasurer of the College for the time being, be created a body politic by the name of the President and Trustees of Bowdoin College, with perpetual succession. The third section declares, that

the corporation so created, for the more orderly conducting the business thereof, shall have full power and authority, from time to time, to elect a Vice-President and Secretary of the corporation, and *to declare the tenures and duties of their respective offices;* and also to remove any Trustee from the same corporation, when in their judgment he shall be rendered incapable by age, or otherwise, of discharging the duties of his office, or shall neglect or refuse to perform them, and to fill up all vacancies in the corporation, &c.; provided, that the number of Trustees, including the President and Treasurer, shall never be greater than thirteen, nor less than seven. The fourth section confers on the corporation the usual powers of corporate bodies, and among others the power to hold real estate, the clear annual income of which shall not exceed £ 10,000. The fifth section authorizes them to elect a President, Treasurer, Professors, and Trustees, and other college officers; to purchase lands, erect colleges, &c., and to make all reasonable regulations and by-laws, not repugnant to the laws of the State; and to confer degrees. The sixth section declares, that the clear rents, issues, and profits of all the estate, real and personal, of which the corporation shall be seised or possessed, shall be appropriated to the endowment of the College, in such manner as shall most effectually promote virtue and piety, the knowledge of languages, and the useful and liberal arts and sciences, as shall be directed from time to time by the corporation. The seventh section proceeds to declare, that the acts of the corporation respecting elections, the purchase and erection of houses, the duties, salaries, and tenures of officers, the appropriation of moneys, the acceptance of conditional donations, the conferring of degrees, the making and altering of the rules and orders, &c. &c., shall not have any force or validity, until agreed to by the Board of Overseers created by the same Act.

The ninth section proceeds to appoint certain persons by name, (in number forty-three,) together with the President of the College, and the Secretary of the corporation, the Board of Overseers of the College, creating them a body corporate with the usual powers, and among others with the power of amotion of the members of the Board, and providing, that the Board shall never be greater than forty-five, nor less than twenty-five. The sixteenth section provides, "that the Legislature of this Commonwealth may grant any further powers to, or alter, limit, annul, or restrain any of the powers by this Act vested in the said corporation, *as shall be judged necessary to promote the best interests of the said College.*" The seventeenth section grants to the College five townships of land, of the contents of six miles square, to be laid out and assigned from any of the unappropriated lands belonging to the Commonwealth, in the then District of Maine, the same to be vested in the Trustees of the College and their successors for ever, for the use, benefit, and purpose of supporting the College, with power to dispose of them, &c., and subject to certain conditions of settlement.

Such are the most material clauses of the charter. The lands so granted by the Commonwealth have been vested in the corporation; and other donations have from time to time been received by it from the munificence of private individuals. The College Boards, soon after the grant of the charter, were duly organized under the charter, and suitable arrangements were made, so that the College went into operation in the year 1801, and has ever since continued to perform the functions, for which it was established, in the promotion of sound literature, and the liberal arts and sciences.

No alteration was ever proposed, or made to the charter, during the union of Massachusetts and Maine. But upon the separation of the latter, as an independent State, from the

former, it was provided by the Act of separation of the 19th of June, 1819, (which was incorporated into the Constitution of Maine, which went into effect on the 15th of March, 1820,) among the fundamental articles, that "all grants of land, franchises, immunities, corporate, or other rights, &c., which have been or may be made by the said Commonwealth before the separation, &c., shall continue in force, after the said District shall become a separate State. But the grant, which has been made to the President and Trustees of Bowdoin College out of the tax laid upon the banks, &c., shall be charged upon the tax upon the banks within the said District of Maine, and paid according to the terms of the grants. And the President and Trustees, and the Overseers of the said College shall have, hold, and enjoy their powers and privileges in all respects, so that the same shall not be subject to be altered, limited, annulled, or restrained, except by judicial process according to the principles of law." And the ninth article of the same Act declares, that the fundamental article shall be incorporated, *ipso facto*, into the State Constitution, "subject, however, to be modified or annulled by the agreement of the Legislature of both the said States; but by no other power or body whatsoever." With a view, doubtless, to meet the special security thus given to the rights and privileges of Bowdoin College, another article (the 8th) of the Constitution of Maine declares, "that no donation, grant, or endowment, shall at any time be made by the Legislature to any literary institution, now established or which may hereafter be established, unless at the time of making of such endowment, the Legislature of the State shall have the right to grant any further powers to, alter, limit, or restrain any of the powers vested in any such literary institution; as shall be judged necessary to promote the best interests thereof."

By a vote passed by the Trustees of the College in July, 1801, and duly concurred in by the Board of Overseers, the salary of the President of the College was fixed at $1000 per annum, (an addition of $200 was afterwards made in 1805,) to be paid in quarterly instalments, and to commence, when he shall enter on the duties of his office; and it has accordingly been constantly so paid by the Treasurer, without any further order of either Board, from time to time, to the President for the time being, without objection. By another vote of the College Boards of November 4th, 1801, the tenure of the office of the President was declared to be during good behaviour. By the by-laws of the institution, every candidate for a degree was required to pay five dollars to the Treasurer for the President; and a like fee was subsequently required for every medical degree. Dr. Allen, (the plaintiff,) was duly elected President of the College in December, 1819; and in May, 1820, he was inaugurated, and assumed the duties of the office under this known tenure of office, and the salary and perquisites annexed thereto. In the same month, with the zealous co-operation of President Allen, the College Boards passed a vote, which, after reciting the clause of the Constitution of Maine as to endowments, already referred to, declared, that the consent of the Boards be given, that the right may be vested in the Legislature of the State of Maine, (that is, the right to enlarge, alter, limit, or restrain the powers given by the College charter,) and that a committee be authorized in behalf of the institution to take such measures as may be necessary to vest such right in the said Legislature, so as to enable them to make the endowment thereby prayed for, or any further endowment, which they in their wisdom might be disposed to make. President Allen was appointed one of this committee; and accordingly application was made to the Legislatures of Massachusetts and

Maine for their assent to such modification of the College charter, as should enable the College constitutionally to receive patronage and endowments from the Legislature of Maine. The Legislature of Massachusetts accordingly passed a resolve on the 12th June, 1820, and the Legislature of Maine one on the 16th of the same month, on this subject, the terms of which were fully discussed by the Court. The Legislature of Maine, supposing that by the conjoint operation of the State Legislatures, all restraint upon their constitutional authority to alter the charter was removed, in March, 1821, passed an Act providing, that the number of trustees of the College, including the President, should never be less than twenty nor more than twenty-five, and a quorum to be thirteen; and the number of Overseers should never be less than forty-five nor more than sixty; that *the Governor and Council should appoint twelve persons as Trustees, and fifteen as Overseers, &c. &c.;* that the Boards respectively should thereafter fill all other vacancies. Other Acts were passed in June, 1820, in February, 1822, and in February, 1826, respecting the College, upon the terms of which it is unnecessary to dwell. On the 31st of March, 1831, the Act was passed, which has given rise to the present controversy. The first section declares, "that no person holding the office or place of President in any College in this State" (and there were at that time, and are now, but two colleges in the State) "shall hold said office or place beyond the day of the next Commencement of the College, in which he holds the same, unless he shall be re-elected. And no person shall be elected or re-elected to the office or place of President, unless he shall receive in each Board two thirds of all the votes given in the question of his election. And every person elected to said office or place after the passing of this Act, shall be liable to be removed *at the pleasure of the Board of Trustees,*

or *Board of Trustees and Overseers*, which shall elect him." The second section provides, "that the fees paid for any diploma, or medical or academical degree, &c., shall be paid into the treasury for the use of the College, and no part shall be received by any officer, as a perquisite of office." At the annual meeting of the Boards of the College in September, 1831, they passed a vote, "that they *acquiesce in said Act*, and will now, &c., proceed to carry the provisions thereof into effect." The Board of Trustees then proceeded, (after having given due notice to President Allen,) to an election of President; but no candidate having a majority of votes, no choice was made, and the College has ever since remained without any acknowledged President.

The present action has been brought by Dr. Allen, against the defendant, who is Treasurer of the College, for the salary and perquisites of office due to him, (as he contends) as President of the College, *de jure*, notwithstanding his ejection from office in September, 1831.

Greenleaf for the plaintiff; *Longfellow* for the defendant.

Greenleaf. The corporation of Bowdoin College is in its nature a private eleemosynary corporation. This is manifest from the terms of the charter; the Legislature having *reserved* to itself the right to alter or annul the powers therein granted. If it were a public corporation, such reservation would be superfluous. It was so treated in the Separation Act, and in the Constitution of Maine, by which the rights and privileges of this College were placed beyond the reach of the Legislature. The purpose of general education did not make it a public corporation. 4 Wheat. R. 631, 667. The charity of almost every hospital and college may be public, while the corporation is private. 2 Kent's Comm. 222, 223; *Dartmouth College* v. *Woodward*, 4 Wheat. R. 634; *Philips* v. *Bury*, 2 Term R. 346, note. The

great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. 4 Pet. R. 562. And wherever the acceptance of the charter is necessary to give operation to the act of the government, it is a private corporation. Ang. & Ames on Corp. 46. Such acceptance created a contract between the State and all parties interested in the College. *Lincoln and Kennebeck Bank* v. *Richardson*, 1 Greenl. R. 81. The property granted to the College became private property, out of which any judgment against the corporation might be satisfied; and which the State could not resume, nor again acquire, but for public uses, and upon the payment of compensation. And the contract thus created could not be rescinded, nor the rights vested under it be devested, by any Act of the Legislature. *Fletcher* v. *Peck*, 6 Cranch R. 87; *New Jersey* v. *Wilson*, 7 Cranch R. 164; *King* v. *Dedham Bank*, 15 Mass. R. 454; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. R. 344; *Society, &c.* v. *Wheeler*, 2 Gal. R. 139; *Dash* v. *Van Kleeck*, 7 John. R. 477; *Terrett* v. *Taylor*, 9 Cranch R. 43.

The College thus erected consists of two distinct corporations; namely, The President and Trustees, and The Board of Overseers. The latter is, in the sixth section, styled "the supervising body," having a negative on the acts of the President and Trustees, and possessing all the essential attributes of visitor of the College. The right of visitation is evidently granted away by the State to the Board of Overseers. The two corporations are empowered, by the charter, to elect a President and other officers; "and to determine the duties, salaries, emoluments, and tenures of their several offices aforesaid." The power of amotion, for just cause and in a legal manner, may be considered as granted by necessary implication; such power being one of the incidents of every

corporation. *Per Lord Mansfield* in *Rex* v. *Richardson*, 1 Burr. R. 539; *Lord Bruce's case*, 2 Stra. R. 819; *Rex* v. *Lyme Regis*, Doug. R. 149; Angell Corp. 410, 413, 246.

In the exercise of these powers, the College declared the tenure of the office of President to be during good behaviour; and fixed his salary; and the invariable usage, proved in the case, and amounting to a contemporaneous practical exposition of the vote, has been to pay it quarterly; generally without demand, and always without any special order of the corporation or its officers. Certain perquisites also were directed by the by-laws to be paid by candidates for degrees, "to the Treasurer for the President." This office, moreover, being of the essence of the corporation, the incumbent had a franchise in it. *Dighton's case*, 1 Ventr. R. 77, 82. The place also of Trustee, which he held *virtute officii*, though no emoluments were attached to it, is a franchise. And in either case the party unlawfully put out may be restored by *mandamus*. *Fuller* v. *Trustees of Plainfield Academy School*, 6 Conn. R. 532.

From these premises it results, that the acceptance of the office of President created a private contract of service between the plaintiff and the College, which neither party, nor the Legislature could annul or impair. He was an officer of private instruction; as truly so as the principal of a private academy, and his rights were as absolutely vested.

Having been thus elected, and having performed the duties of his office, the plaintiff is entitled to his salary and perquisites; for the recovery of which the proper remedy is by action against the Treasurer, for money had and received. It is in evidence, that the Treasurer had in his hands sufficient funds for this purpose; that the salary was payable quarterly; and that by the usage of his office, and the practice of the College, no special order was required for the pay-

ment. It was therefore, at the end of each quarter, the money of the President, in the hands of the Treasurer, who became his trustee for the sums he was entitled to demand, whenever they became payable. And the payment to the President would have been a conclusive answer to any action brought by the College against its Treasurer for the same money. It is simply the case of money deposited with A, to be paid over to B; who may always recover it of A, in this form of action. *Scott* v. *Surman*, Willes R. 404; Comyn on Contr. 270; *Heard* v. *Bradford*, 4 Mass. R. 326; *Oliver* v. *Smith*, 5 Mass. R. 183; *Hall* v. *Marston*, 17 Mass. R. 575; *Eagle Bank* v. *Smith*, 5 Conn. R. 71; *Arris* v. *Stukely*, 2 Mod. R. 260; *Boyter* v. *Dodsworth*, 6 D. & E. R. 681; *Hearsey* v. *Pruyn*, 7 Johns. R. 179; *Sadler* v. *Evans*, 4 Burr. R. 1984.

The authority of Maine to modify the College charter, upon which the defence in the present case is understood to be founded, is supposed to be derived from the transactions of the corporations, and of the two States in the year 1820; but upon an examination of those acts, no such authority will be found to have been given. Massachusetts, by its resolve of June 12th, 1820, consented to such alterations of the charter, not affecting the rights and interests of the Commonwealth, as the President and Trustees, and the Overseers, or their agents might make, with the consent of the Legislature of Maine. It contemplated specific alterations, to be originated from time to time, by the College or its immediate agents, remote from the influence of popular excitement and the strife of party; which, being submitted in a matured form to the Legislature of Maine, might with its approbation, become a law. But, instead of this, the corporations were understood by the Legislature of Maine to have sold out to this State the whole trust confided to them, with

the right to originate and establish alterations at its pleasure; thus exposing the College to all the storms of political and sectarian violence in a legislative assembly. Under this impression, and without acting on the proposal of the parent State, Maine passed the subsequent Act of June 16th, 1820, taking to itself the right to modify the charter at its pleasure, and making the Act to take effect, provided Massachusetts *shall* consent thereto. This consent never has been given; and as no provision is made for securing the rights or interests of Massachusetts, its consent is not to be presumed. Its plain intent, in the Resolve of June 12th, has evidently been disregarded; and neither State has acted on the proposition of the other. Hence all the subsequent legislation of Maine in relation to the College is merely void, and the College still enjoys the immunity secured to it by the Constitution.

The assent of the plaintiff is, in this view, of no importance. It could not give to the State a jurisdiction, which the Constitution had inhibited; nor surrender the rights of Massachusetts, over which he had no control.

But if the law of 1820 were a valid act, it would not justify the ulterior proceedings of Maine. It gives authority to "alter, limit, and restrain, or extend the *powers* and *privileges*" of the corporations. The *powers* of a corporation are those things which it may lawfully do; its *privileges* are those things which it may lawfully enjoy. Hence the Legislature could only modify the capacities of the corporations. It could not do corporate acts in their stead. It could neither make by-laws, nor create Trustees nor Overseers, nor displace any member of the corporation. If it might limit powers, it could not assume to exercise them. If it might invigorate the arm, it could not cut it off. Therefore the Act of March 19th, 1821, authorizing the Governor and Council to appoint twelve additional Trustees and fifteen Overseers, and to fill certain

vacancies, is void; it being not within the authority professedly granted, and being also a direct exercise of corporate powers. And the subsequent acts of the corporations are vitiated by the votes of these newly appointed Trustees and Overseers, unless it is made apparent, that such votes could not affect them.

Nor can the defence be supported by the Statute of 1832, ch. 517; for this Act also is in violation of the Constitution, both of Maine and of the United States. Its provisions are obviously pointed at President Allen, since the language cannot apply to the other College in this State, which has no Board of Overseers. It is, in effect, an Act to remove *him* from office. It destroys his vested right in the office, and violates the contract of his election, by creating a new tenure of the office, which, till then, was held during good behaviour. It places the contract wholly in the power of one party. It is an exercise of the power of amotion; and this, too, without notice or judgment of law. But even the corporation could not remove from office till after notice to appear and show cause. Ang. & Ames on Corp. 244; *Fuller* v. *Trustees of Plainfield, &c.*, 6 Conn. R. 532. And the notice should specify the charges preferred against the incumbent. *Exeter* v. *Glide*, 4 Mod. R. 33, 37. It ousts the plaintiff from his franchise, as a Trustee and Overseer, without judgment of law, and without any offence on his part. *Commonwealth* v. *St. Patrick's Benevolent Society*, 2 Binn. R. 449, 450; 2 Kent's Comm. 239; Ang. & Ames Corp. 244; *Dartmouth College* v. *Woodward*, 4 Wheat. 518. It is a direct and original exercise of corporate powers. And it transcends even the limits of the Act of 1820, which permits the Legislature to modify the powers of the corporation, but not to annul them. Yet this Statute annuls the powers of the College to grant fees and perquisites to the President, and to fix

the tenure of his office; which were secured to the corporations by the original charter. In fine, constituted as this College was, with duties so important, and privileges so valuable, the right of control, reserved to the Legislature, should be exercised with extreme caution; and should be so limited as to promote the original and peculiar objects of the foundation, and to enlarge rather than restrain the benefits of its relation to the public.

Longfellow for the *defendant*. The preliminary inquiry in this case is, whether the action can be maintained against this defendant. He is charged, it is true, as the Treasurer of the College; but this is merely *descriptio personæ*. He is not the corporation, but its agent; receiving its money in that character alone. His exhibits show, that the sums he received were "for the corporation," and not for the President. He has charged himself with the amount, and is liable to the corporation alone. The privity of contract, on which this action is to be maintained, if at all, is between the plaintiff and the College. If the Treasurer had wasted the moneys in his hands, will it be contended, that the plaintiff would have no remedy against the College? On the other hand, if the corporation were insolvent, is the Treasurer therefore liable *de bonis propriis* to the plaintiff? His situation involves no other responsibilities than those of the cashier of a bank, having received the amount of a note left in the bank for collection; in which case the remedy of the depositor would be against the corporation, and not against its servant. The moneys received "for the President" went into the common mass of the College funds, the Legislature, by the Act of 1831, having repealed the by-law by which he formerly had received them. And in this Act both the corporations had acquiesced, and were therefore bound by its provisions, which they had in fact attempted to carry into effect.

The authorities cited by the plaintiff in support of the action, may be answered by the single remark, that they all are cases of money received by the party in his private capacity, and not by virtue of any office, like that of the present defendant. They therefore furnish no support to this action.

But if this action would lie, under other circumstances, yet this plaintiff cannot maintain it, not being the President of the College. He was removed from office by the operation of the Act of 1831; which it was the constitutional right of the Legislature to pass. For the College is in every respect a public institution. It was originally established and endowed by the State; the Legislature reserving the right to modify and even to annul its charter. In each of these essential particulars it differs from Dartmouth College; and therefore the case of that College furnishes no analogy for the decision of this. Bowdoin College, it is true, has received munificent donations from the Bowdoin family; but these gifts were made to an institution already established by the public, and do not, in any degree, make it a private corporation. Neither is it private because Trustees have been appointed to manage its concerns. This power must be vested somewhere; and the effect is the same whether it is exercised immediately by the Legislature, or more remotely by agents of its appointment. Every institution, whether hospital or college, created and endowed by the government, as this was, for purposes of general charity, is a public corporation. The subsequent gifts of private benefactors, without Statutes directing their employment, are engrafted into the original foundation, but do not change its character. The State, as the founder, still retains the visitatorial power; and may restrain and control the Trustees, should they abuse their trust. *St. John's College* v. *Toddington*, 1 Burr. R. 200.

This power of the State may be farther argued from the patronage it has bestowed; the visitation always following the patronage. 4 Wheat. R. 675. In the present instance it has also been expressly reserved.

It is conceded, that the Legislature has not the right to "annul" the corporation; but it may take away any of its powers, and substitute others, whenever it may deem the interests of the institution to require it. Or it may lawfully resume to itself the power of appointing to office, fixing tenures, and filling vacancies in the corporations. Of the expediency of such a measure, it is not necessary now to speak; but the existence of the power, and the right to exert it, are clear.

It was to an office subject to this legislative control, that the plaintiff was elected. Though a provision for the immunity of the College was inserted in the Act of Separation, yet he was aware that its effect might be done away by the joint power of the two States. And if, by a joint Act, they have modified the condition of the College, pursuant to such known powers, he has no right to complain. Nay more, it is proved that he himself procured the passage of the Act of 1820, of which he was strongly in favor; and his assent being, not merely his official, but his private act, he is subject to all its consequences.

The argument against the binding force of the Act of 1820, founded on the supposed want of assent on the part of Massachusetts, proceeds on a construction altogether too narrow. The meaning of all parties was, only that the power of control should not be assumed by Maine, without the consent of Massachusetts. Whether the restriction was expressed by the words "shall agree," or "shall have agreed," is wholly immaterial; as is farther evident from the fact, that Massachusetts, in the same Statute, engaged to ratify whatever ar-

rangements should be made between the corporation and the new State. And the corporation having instructed its Committee to vest the power of control in the Legislature of Maine, and this State having accepted and exercised the power thus granted, it has therefore been ratified by Massachusetts, and the Act is binding. If it be true, that alterations should originate with the President and Trustees, this has been done. The Committee, who addressed the Legislature of Maine, communicated the terms of a modification originally proposed by the corporations of the College. The condition of the College, after the passage of the Act of 1820, was the same as it was under the original charter, and before the separation, excepting the power to annul. Hence the enlargement of the two Boards, under the Act of 1821, was within the purview of the terms of the surrender in the preceding year. The Legislature might lawfully have gone farther, and assumed to itself the right to fill all vacancies. But if this power were doubtful, it has been ratified by the College; and the right can no longer be questioned. Had either corporation been disposed to resist, its dissent should have been expressed at the time. Instead of which, the members newly admitted have been tacitly recognised by each Board, as legally entitled to their seats; and twelve years of profound acquiescence by all parties have already elapsed, affording the strongest presumptive proof of assent to the Statute. This is one of the arrangements to which the ratification of Massachusetts is to be extended. If, however, these members were not legally appointed, it would not follow, that their votes vitiated the subsequent transactions of the Boards, unless it should appear, that such measures were actually decided by their votes. And the burden of this proof is on the plaintiff, the legal presumption being in favor of their validity.

The Act of 1831 is nothing more than a legitimate exercise of the powers vested in the State by the Statute of 1820. It violates no vested rights of the plaintiff, for he accepted the office of President, subject to the legislative right of modification. To this right he personally assented. The Statute does not remove him from office; but merely declares, that no President shall hold his office unless re-elected. The amotion resulted from the act of the Trustees and Overseers, under the Statute. But whether it resulted from a corporate or a legislative act, it is legal, being only an exercise of visitatorial power. And no notice was necessary, it being a public and not a private corporation.

Neither is this Statute void, as impairing the obligation of a contract. All presumptions and doubts must lean in favor of its constitutionality. It would be dangerous to presume otherwise. The unconstitutionality of any Statute must be clearly manifest, to justify any Court in so pronouncing it. Is such the character of this Statute, so solemnly enacted, and so deliberately assented to by those whose obedience was required to its provisions?

Greenleaf in reply. The Treasurer, in his exhibit, states, that the perquisites were received "for the corporation"; but the law says, he received them "for the President." If the latter is entitled to them, he may recover them in this action. They were originally paid to him by the persons graduated; and afterwards, from motives of convenience and decorum, were paid to the Treasurer for his use. For the salary, at least, the plaintiff has a double remedy; either against the corporation, as the contracting party, or against the Treasurer, as trustee to his use.

The supposed acquiescence of the corporation in the Act of 1831, was merely a silent submission to superior force. However mistaken the policy which dictated this submis-

sion, it was nothing more than the bending of the rush before the tempest. It can never amount to a deliberate and voluntary adoption of the extraordinary enactments of that Statute, as a lawful amendment of the College Charter. The State is not the visitor of this corporation. All the attributes of a visitor are, by the sixth and seventh sections of the original charter expressly vested in the Board of Overseers, as "a supervising body." The Legislature reserved no such right to itself, nor has it ever been withdrawn from the Overseers.

STORY J.* This cause has been argued with a degree of learning and ability proportionate to its importance. I have taken time to consider it, and propose now to deliver the judgment, which, upon mature deliberation, I feel bound to adopt.

Two questions have been made at the bar. First, whether the present action is maintainable against the defendant, as Treasurer, supposing the plaintiff still to be rightfully in office. Secondly, whether the plaintiff is rightfully in office, notwithstanding the Act of 1831, and the proceedings of the Board thereupon; so that he is entitled to recover the amount of his salary and perquisites, or either, against the College.

A strong desire has been expressed at the bar in behalf of the parties, that the Court would not, even if it might, confine its judgment to the first question; but that it would proceed to decide the whole merits of the controversy, as essential to the good order and prosperity of the College, as well as to the rights of the defendant. Under these circumstances, although I am conscious of the delicacy and difficulty of the task, (a task, from which I would gladly

* His Honor the District Judge did not sit in this case.

have been spared,) I shall express the opinion, which I have deliberately formed upon both the questions in the case without hesitation, but at the same time with all the diffidence, which the magnitude of the interests involved in them cannot fail to create. For the present, I shall pass the question, whether the action is maintainable against the present defendant, and proceed at once to the main points upon the merits.

And the first point naturally arising upon the discussion is, in what light the original Charter granted by Massachusetts for the establishment of Bowdoin College is to be viewed. Is it the erection of a private corporation for objects of a public nature, like other institutions for the general administration of charity? Or is it, in the strict sense of law, a public corporation, solely for public purposes, and controllable at will by the legislative power, which erected it, or which has succeeded to the like authority? The former is asserted by the plaintiff's counsel to be its true predicament; the latter is as strenuously contended for on the other side.

That a College established for the promotion of education, and for instruction in virtue and piety, and in the liberal arts and sciences, is in some sense a public institution or corporation, cannot well be denied; for it is for the benefit of the public at large, or at least for all persons, who are suitable objects of the bounty; and this is the popular sense, in which the language is commonly used. And in this sense an institution founded exclusively by private donors for purposes of general charity, such as a hospital for the poor, the sick, the disabled, or the insane, may well be called a public institution. But in the sense of the law a far more limited, as well as more exact, meaning is intended by a public institution or corporation. Upon this subject, however, I may well spare myself from any elaborate exposition, since it was fully

considered in the great case of *Dartmouth College* v. *Woodward*, (4 Wheat. R. 518,) from which I will make a quotation, contained in the opinion of one of the Judges, which it is well known had the approbation of the Court: "Public corporations," (says the opinion,) "are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests. But, strictly speaking, public corporations are such only, as are founded by the government for public purposes, *where the whole interests belong also to the government.* If, therefore, the foundation be private, though under a charter of the government, the corporation is private, however extensive the uses may be, to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own use, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So is a hospital created and endowed by the government for general charity," (meaning, as is obvious from the context, a hospital like the Navy Hospital, or the General Marine Hospital, established and supported by the United States out of its own funds, and over which it retains the entire government.) "But a bank, whose stock is owned by private persons," (and it might have been added, partly by private persons and partly by the government,) "is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases the uses may, in a certain sense, be called public; but the corporations are private; as much so, indeed, as if the franchise were vested in a single person."

"This reasoning applies in its full force to eleemosynary

corporations. A hospital, founded by a private benefactor, is in point of law a private corporation, although dedicated by its charter to general charity. So is a college, founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class of the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities; and cannot be shaken, but by undermining the most solid foundations of the common law." It is afterwards added: "The fact, then, that the charity is public, affords no proof, that the corporation is also public; and consequently the argument, so far as it is built upon this foundation, falls to the ground. If, indeed, the argument were correct, it would follow, that almost every hospital and college would be a public corporation, a doctrine irreconcilable with the whole current of decisions since the time of Lord *Coke.*" And it is further stated, that no authority exists in the government to regulate, control, or direct a corporation, or its funds, "except where the corporation is in the strictest sense public; that is, *where its whole interests and franchises are the exclusive property and domain of the government itself.*" [1]

That a college, merely because it receives a charter from the government, though founded by private benefactors, is not thereby constituted a public corporation, controllable by the government, is clear beyond any reasonable doubt. So the law was understood by Lord *Holt*, in his celebrated judgments in *Phillips* v. *Bury*, (1 Ld. Raym. R. 8; *S. C.* 2 T. R. 346.) Lord *Hardwicke*, in *The Attorney-General* v. *Pearse*, (2 Atk. R. 87,) said, "The charter of the Crown cannot make a charity more or less public, but only more permanent, than it would otherwise be." And the decision of the

[1] See 4 Wheat. R. 668 - 672.

Supreme Court, in the case of *Dartmouth College* v. *Woodward*, is direct to the same purpose.

Nor does it make any difference, that the funds have been generally derived from the bounty of the government itself. The government may as well bestow its bounty upon a private corporation for charity, as upon a public corporation; and its funds once bestowed upon the former become irrevocable, precisely in the same manner, and to the same extent, as if they had been bestowed upon an individual. The government cannot resume a gift, once absolutely made to a private person; neither can it resume a like gift to a private corporation. It is true, that the government may reserve such a power in granting a charter, if it chooses so to do; but, then, the power arises from the very terms of the grant, and not from any implied authority derived from the bounty being for general charity, any more than it would from its being for private charity. The government may reserve a right to revoke at pleasure even its private gifts; but certainly the law will not imply such right without some positive expression of such an intention. Mr. Chancellor *Kent* has stated the true principles of law on this subject, with his usual accuracy and clearness: "An eleemosynary corporation," (says he,) "is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, by *public and private donations.*"[1]

To be sure, where the government is the founder of a college, it has certain rights and privileges attached to it in point of law; but in this respect it is not distinguishable from any

[1] 2 Kent Comm., Lect. 23, p. 274, (2d edition.)

private founder. Every founder of an eleemosynary corporation, (that is, the *fundator perficiens*, or person, who originally gives to it its funds and revenues,) and his heirs, have a right to visit, inquire into, and correct all irregularities and abuses, which may arise in the course of the administration of its funds, unless he has conferred (as he has a right to do) the power upon some other person. This power is commonly known by the name of the *visitatorial power*, and it is a necessary incident to all eleemosynary corporations; for, these corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution; and therefore ought to be liable to some supervision and control.[1] But, what is the nature and extent of this visitatorial power? Is it a power to revoke the gift, to change its uses, to devest the rights of the parties entitled to the bounty? Certainly not. It is a mere power to control and arrest abuses, and to enforce a due observance of the statutes of the charity. Lord *Holt* in *Phillips* v. *Bury*, (2 T. R. 352,) says, "The visitatorial power is an appointment of law. It ariseth from the property, which the founder had in the lands assigned to support the charity; and, as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the accounts, and regulate the behaviour of the members, that partake of the charity; for it is fit the members, that are endowed, and that have the charity bestowed upon them, should not be left to themselves, (for divisions and contests will arise amongst them about the dividend of the charity,) but pursue the intent and design of him that bestowed it upon them."

But the founder may part with his visitatorial power, and vest it in other persons; and when he does so, they exclusively

[1] 1 Black. Comm. 480.

succeed to his authority. No technical terms are necessary to assign over, or vest the visitatorial power. It is sufficient, if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred, that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modification or control by the fundamental statutes of the foundation.[1] Now, it is a general rule in the construction of charters, that if the objects of the charity are not incorporated, but certain trustees are incorporated to manage the charity, the visitatorial power is deemed to belong to such trustees in their corporate capacity.[2] And so the law is laid down by Lord *Holt* in *Phillips* v. *Bury*, (2 T. R. 352, 353.) This visitatorial power is an hereditament, founded in property, and valuable in the intendment of law; and where it is vested in trustees, there can be no amotion of them from their corporate capacity, and no disturbance or interference with the just exercise of their authority, unless it is reserved by the statutes of the foundation or charter. But, still, as managers of the revenues of the charity, they are not beyond control; but are subject to the general superintendence of a Court of Chancery, for any abuse of their trust in the management of it.

If, with these principles in view, we examine the charter of Bowdoin College, we shall find, that it is a private and not a public corporation. It answers the very description of a private college, as laid down by Mr. Chief Justice *Marshall*, in *Dartmouth College* v. *Woodward*, (4 Wheat. R. 640,

[1] *Dartmouth College* v. *Woodward*, 4 Wheat. R. 675. *Phillips* v. *Bury*, 2 T. R. 350, 352, 353.

[2] Ibid. *Green* v. *Rutherford*, 1 Ves. 472. *Attorney-General* v. *Middleton*, 2 Ves. 327. Case of *Sutton's Hospital*, 10 Co. R. 23, 31. 2 Kent Comm., § 23, p. 300, &c., (2d edition.)

641.) It "is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the objects of that bounty. Its trustees were originally named by the founder, and invested with the power of perpetuating themselves. They are not public officers; nor is it a civil institution; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation." The Commonwealth of Massachusetts is its founder, having given it its original funds. But it is made capable of receiving, and has actually received, funds from the bounty of private donors. As founder, the Commonwealth of Massachusetts would have possessed the visitatorial power, if it had not entrusted that, and all other powers, and franchises, and rights of property of the College, to the Boards of Trustees and Overseers established by the charter, and in the manner therein stated. As soon as that charter was accepted, and carried into operation, by the Trustees and Overseers named in it, they acquired a permanent right and title in their offices, which could not be devested, except in the manner pointed out in that charter. The Legislature was bound by the Act; they could not resume their grant; and they could not touch the vested rights, privileges, or franchises of the College, except so far as the power was reserved by the 16th section of the Act. The language of that section is certainly very broad; but it is not unlimited. It is there declared, that the Legislature "may grant further powers to, or alter, limit, annul, or restrain any of the powers by this Act vested in the said corporation, *as shall be judged necessary to promote the best interest of the College.*" Whatever it may do, then, must be done to promote the best interest of the College. It is true, that it is constituted the sole judge, what is the best interest of the College; but still it

cannot do any thing pointedly destructive of that interest. Its authority is confined to the enlarging, altering, annulling, or restraining of the *powers* of the corporation. It cannot intermeddle with its *property*; it cannot extinguish its corporate existence; it cannot resume all its property, and annihilate all its powers and franchises. The Legislature must leave its vitality and property, and enable it still to act as a college. It cannot remove the Trustees, or Overseers, though it may abridge, as well as enlarge, their powers. At least, any argument, which should attempt to establish a different doctrine, must proceed upon the difficult assumption, that a power "to promote the best interest of the College," included a power to destroy all its interests, nay its very existence.

But it is unnecessary to enlarge upon this topic, since the present case does not rest upon the effect of this clause of the original Charter. The Act of Separation, which is constitutionally binding upon the Legislature of Maine, gives, as we have seen, a complete guaranty to the powers and privileges of the President, Trustees, and Overseers, under the charter; so that they are incapable of being altered, limited, annulled, or restrained, except by judicial process according to the principles of law, unless that Act has been modified by the subsequent agreement of the Legislatures of both States.

The next inquiry naturally is, whether any such modification has been made, as is contemplated by the Act of Separation. If it has, another inquiry will be, what is the true extent of the modification actually made and authorized. The Resolve of the Legislature of Massachusetts was passed (as we have seen) on the 12th day of June, 1820. After reciting the clause in the Act of Separation, above referred to, and the petition of the Trustees and Overseers of Bowdoin College for such a modification of that clause, as would enable the Legislature of Maine to make donations, grants, and

endowments to the College, it is resolved, "That the consent and agreement of this Commonwealth be, and the same is hereby, given to any alteration or modification of the aforementioned clause or provision in said Act relating to Bowdoin College, *not affecting the rights or interests of this Commonwealth*, which the President and Trustees, and Overseers of the said College, or others having authority to act for said corporation, *may make therein* with the consent of the Legislature of said State of Maine; and such alterations or modications, made as aforesaid, are hereby ratified on the part of this Commonwealth." Now, whether this resolve is exactly in conformity to the petition of the Trustees and Overseers, and carried into effect their objects, or not, is a point wholly unnecessary to be here discussed; for the State of Massachusetts had a right to prescribe such terms, as it pleased; and was not bound to grant what was asked; but what it deemed in its discretion fit to be granted. We must, then, construe the Resolve, as we should any other solemn act of Legislation, according to its true intent to be collected from its terms. Now, it is very clear, that Massachusetts was not willing to make an unconditional surrender of all rights and interests under the charter to the Legislature of Maine; for an express exception or reservation is made of alterations or modifications "*affecting the rights and interests of the Commonwealth*," under the clause of the Act of Separation. The very exception or reservation supposes, that there are some rights and privileges and interests of the Commonwealth, arising under the charter; for otherwise the language of the exception or reservation would be useless, if not absurd. Nor is it difficult to perceive, that the Commonwealth of Massachusetts had rights, privileges, and interests, which might be affected by certain alterations of the charter. In the first place, the Commonwealth was the founder of the College, and had

given certain lands to be appropriated to the uses of the charity. It had a right and interest in having these funds perpetually applied to the original objects of the institution. As founder, too, it was entitled to the visitatorial power over the College; and, having delegated that power to certain Trustees and Overseers in perpetual succession, as its chosen, substituted agents and visitors, it had also a right and interest in having that power perpetually exercised by the very bodies, and by none others, which it had constituted for this purpose. Nothing is clearer in point of law, than the right of a founder to have his visitatorial power exclusively exercised by the very functionaries, in whom he has vested it. It is the very substratum of his dotation.

This is not all. The founder has a right to have the statutes of his foundation, as to the powers of the Trustees, strictly adhered to, except so far as he has consented to any alteration of them. But an authority to alter or modify those powers can never be fairly construed into an authority to take them away from his Trustees, and confer the same powers on other persons. My view of this Resolve, therefore, is, that it authorizes no alterations or modifications of the College charter, which shall divert the funds of the founder from their original objects, or shall vest the visitatorial power in any other bodies, or persons, than the Trustees and Overseers marked out in the original charter; and *à fortiori*, that it does not justify the transfer of these powers from the Trustees to any other persons not in privity with them. It does not authorize the Legislature of Maine to assume to itself the powers of the Trustees, or Overseers, or of either of them, or to appoint new Trustees or Overseers; for that would affect the rights and interests of the founder, who has a right to select his own administrators of his own bounty in perpetuity. I do not say, that the Legislature of Maine might not have

authorized an increase of the number of both Boards, leaving the appointment to be made by the existing Boards; for that would still leave the funds to be administered by agents selected by the proper visitors of the founder. Upon that point I give no opinion. What I do mean to say is, that the Legislature of Maine was not authorized by this Resolve of Massachusetts to affect the rights and interests of the latter State, by making appointments of Trustees and Overseers of the charity through its own agency, and independent of the agency of the Charter Trustees, and Overseers. Massachusetts has nowhere therein given any assent to such an alteration or modification of the charter of the College.

But this is not all. The language of the Resolve is, that Massachusetts assents and agrees to any alteration and modification, "which the President and Trustees, and Overseers, of said College may make therein with the consent and agreement of the Legislature of said State of Maine; and such alterations or modifications, *made as aforesaid, are hereby* ratified on the part of this Commonwealth." Now, I confess, that I think there is great force in the argument, that this Resolve had in view certain alterations and modifications, then to be made, *uno flatu*, and not any subsequent alterations and modifications, which might from time to time, and in all future times and ages, be made in the charter. It is scarcely conceivable, that Massachusetts should use terms of ratification *in presenti*, as applicable to all such possible alterations in all future times. That was not necessary to accomplish the objects of the petitioners. A single alteration or modification, which should confer upon the Legislature of Maine the authority required by the Constitution to authorize any donation, grant, or endowment of that Legislature to the College, would have been sufficient, without any general and sweeping authority for unlimited changes. But, be this as it

may, it is very clear, that Massachusetts has not assented or agreed to any alterations or modifications, which the Legislature of Maine might in virtue of its own sole authority make, but to such only, as the President and Trustees, and Overseers, of the College may make with the consent and agreement of the Legislature of Maine. The alterations and modifications are, then, to be made by the Boards of the College, or by their agents, with the consent of the Legislature, and not by the Legislature without their consent. In short, the alterations or modifications are to originate with the Boards, and to be made by them; but they are inoperative, unless ratified by the Legislature. If, therefore, the Legislature of Maine has undertaken to make laws, altering or modifying the charter of the College, without making the validity of such laws dependent upon the adoption of the Boards before or after their passage, I have no hesitation in saying, that such laws have never been assented to by Massachusetts, and are, consequently, unconstitutional and void.

But let us see, whether the Legislature of Maine has adopted this Resolve of Massachusetts; for there must be a concurrence of the Legislatures of both States *ad idem*, to repeal or modify the clause in the Act of Separation. It is very certain, that the Legislature of Maine has passed no correspondent Resolve or Act, *in totidem verbis*, nor has it in terms assented or agreed to the Resolve of Massachusetts. How, then, can the Resolve have any operation? The Act of Separation declares, that the fundamental articles, the terms and conditions of the Separation, shall be, *ipso facto*, incorporated into the Constitution of Maine, "subject, however, to be modified or annulled by the agreement of the Legislatures of both the said States." To constitute such an agreement, both parties must assent to the same thing. The whole proposition must be adopted, or nothing. From

the very nature and force of the term, an agreement can be but one thing; and in that one thing, both parties must concur. If, then, Massachusetts and Maine have not agreed to the same identical thing, the *casus fœderis* has not arisen. Indeed, I am inclined to go much farther. I do exceedingly doubt, if any modification or amendment can be made in any of these fundamental articles, without the specific modification or amendment being drawn out, and expressly assented to by both States. I do not think, consistently with the letter or spirit of the qualifying or enacting clause, that the Legislature of either State can delegate to other persons its authority to assent to, or frame, any such agreement. It cannot agree, *ab ante*, to any modifications or amendments, which third persons may make. It must agree to some specific proposition, purporting to be its own final act in the premises.

But, it is argued, that the Act of Maine of the 16th of March, 1820, (which was passed four days after the Massachusetts Resolve,) contains a virtual assent to that Resolve, and that therefore there has been a sufficient compliance with the requisites of the articles of Separation. Let us see, then, what the purport of that Act is. It is entitled "An Act to modify and limit the terms and conditions of the Act of Separation, relative to Bowdoin College, and encourage literature, and the arts and sciences;" and it enacts, "that, provided the Legislature of Massachusetts *shall agree thereto*, the President and Trustees, and the Overseers, of Bowdoin College having already assented thereto, the terms and conditions mentioned in the Act of the Commonwealth of Massachusetts, passed on the 19th of June, A. D. 1819, entitled, &c., be and the same hereby are so far modified, limited, or annulled, as that the President and Trustees, and the Overseers, shall have, hold, and enjoy their powers and privileges, in all respects, subject however, to be altered, limited, restrained,

or extended by the Legislature of the State of Maine, as shall by the said Legislature be judged necessary to promote the best interests of said institution." Now, it seems to me, that this Act is precisely in the form contemplated by the Act of Separation, in order to justify a modification of the charter. It presents a specific alteration for the consideration and agreement of Massachusetts; and thus affords a very strong confirmation of the view, which has been already taken of this point by the Court. The Act is to take effect, and the modification is to be incorporated into the charter, provided the Legislature of the Commonwealth of Massachusetts *shall agree thereto*, that is, to the specific modification proposed in the Act. Now, it is certain, that the Act of Maine, or the specific modification of the charter therein proposed, has never been agreed to by the Legislature of Massachusetts. The Act has never, as far as any of us know, been laid before the Legislature of Massachusetts, either for consideration or for confirmation. The Act does not look to any antecedent Resolve of Massachusetts, and dispense with any farther assent; but it expressly looks to some future act or assent of Massachusetts. The language is, provided the Legislature *shall* agree thereto, not *has* agreed thereto. Nor is this a mere matter of form. It is, in my judgment, a matter of substance, and was so rightly understood by the Legislature of Maine, as indispensable to the constitutional efficacy of the Act of 1820. In no just sense can this Act be construed to be an adoption of the Massachusetts Resolve. The terms are not the same; the objects are not the same; the limitations are not the same. Massachusetts signifies her assent to any alteration or modification "*not affecting the rights and interests of this Commonwealth.*" No such qualification or limitation is to be found engrafted on the Act of Maine. The latter saves no rights and no interests of Massachusetts. Mas-

sachusetts signifies her assent to any alterations, &c., which the President, Trustees, and Overseers, &c., may make in the charter, with the consent and agreement of the Legislature of Maine. The Act of the latter assents to no such general authority; but confines itself to a single proposition; and that conceived almost in the very terms of the 8th article of the Constitution of the State. It is impossible, therefore, in an exact and legal sense to assert, that the Resolve of Massachusetts, and the Act of Maine, speak *ad idem*. The proposition of neither Legislature has been specifically acted upon by the other. There has been a miscarriage of the parties, unintentional, in all probability, but not, in my judgment, the less fatal on that account.

But although I am clear in this opinion, it is not my intention to rest the present case upon this ground alone, though it seems to me impregnable. There is another point of view in which the constitutional doctrine is equally clear, and equally fatal.

Let it be conceded, that the Act of Maine of the 16th of June, 1830, is constitutional, and has become incorporated into the charter of the College, and there yet remains a very important inquiry; what is the true extent of the authority of the Legislature conferred by that Act over the College? The words are, that "the President and Trustees, and the Overseers, of Bowdoin College shall have, hold, and enjoy their powers and privileges in all respects, subject, however, to be altered, limited, restrained, or extended by the Legislature, &c., as shall, &c., be judged necessary to promote the best interests of said institution." In the first place, it is clear, that this language can by no reasonable, indeed, I may say, by no possible interpretation be construed to include an authority to annul the charter, or the corporation created by it, or the institution itself. The word "annul" is not in it, as

it was in the 16th section of the original charter of 1794; but the other words of that section are retained, except that the word "extend" is substituted for the word "grant." This alone would furnish an almost irresistible argument, that the authority to annul was intended to be withheld from the Legislature. But the words of the section in their actual connexion exclude any authority to annul the charter. It would be utterly repugnant to all common sense to say, that an annihilation of the College would be an act to promote its "best interests." The authority is also limited in other respects. It is not an authority to alter, limit, restrain, or extend *the charter* generally; but only to alter, limit, restrain, or extend the *powers* and *privileges* conferred by the charter on the President, Trustees, and Overseers, as may be judged necessary to promote the best interests of the institution. The Act, then, does not authorize the creation of new Boards, in whom the corporate powers and privileges may be vested; nor any transfer whatsoever to other persons of the powers and privileges of the old Boards. The powers and privileges of the existing Boards may be extended or restrained, limited or altered; but they cannot be transferred over to other persons; for that would be an act of a very different Character. Whatever powers and privileges are allowed by the Legislature to be exercised for the promotion of the best interests of the institution, are to be exercised by the Charter Boards. No authority is conferred upon the Legislature to add new members to the Boards by its own nomination, or by that of the Governor and Council of the State. That would be an extension, not of the powers and privileges of the Boards, but of the legislative action over them. If the Legislature could add one new member of its own choice or appointment, and not of the choice or appointment of the Charter Boards, it could add any number whatsoever, five, or fifty,

or five hundred. It could annihilate the powers and privileges of the Charter Boards, under the pretence of alteration or extension. It will hardly be contended, that the Legislature possesses a right to substitute itself in the management of the College and its interests, for the Charter Boards; and if not, how can it confer such an authority upon other persons? The President, Trustees, and Overseers are to "hold and enjoy their powers and privileges in all respects, subject," &c. &c. But how can they hold or enjoy any such powers or privileges, if these are liable to be transferred to any other persons, and taken from themselves? If such had been the intent of the parties, other language would have been used; the Charter, the College, and the Boards would have been made subject to the pleasure of the Legislature. The power to annul and transfer the powers and privileges would have found its way into the Act in a clear and determinate manner. I agree, that the Legislature might authorize an enlargement of the Boards, by the appointment of new members to be nominated by the Boards; for it would be but an enlargement of the powers and privileges of the existing Boards. But it is morally impossible, as I think, to engraft upon the terms of the Act an authority in the Legislature to make, of itself, new Boards, or to change the whole organization of the old Boards, by the addition of members not chosen by those Boards. I am not prepared therefore, to admit, that the Act of the 19th of March, 1821, enlarging the Boards, or the Act of the 27th of February, 1826, making the Governor, *ex officio*, a member of the Board of Trustees, can be maintained as constitutional exercises of authority. I do not say, that the proceedings of the Boards, as actually constituted since the passage of those Acts, are void. That is a very different question, turning upon very different considerations. There is a marked distinction in the law, which allows the acts of

many officers *de facto* to be good, although they may not be officers *de jure*, or regularly elected. The present case is quite enough loaded with difficulties for the Court not to desire to plunge into that point, although, from the strong desire expressed, and the discussions pressed at the bar for an opinion upon this point, it has not been very easy wholly to avoid it.

Let us see, then, how far the Act of the 31st of March, 1831, is affected by any of these considerations. It is in its terms an Act of positive and direct legislation. It legislates the existing Presidents of Bowdoin and Waterville Colleges (the only colleges in the State) out of office from and after the next annual Commencement of the Colleges. It is a direct exercise of the power of amotion from office by the Legislature itself. That very power was expressly and exclusively conferred upon the College Boards by the original charter. Massachusetts has never consented, that it should be taken away from those Boards, and be exercised by the Legislature of Maine; for it is an alteration or modification "affecting the rights and interests of that Commonwealth," in regard to those very Boards. The Act of Maine of June, 1820, has not conferred this power on the Legislature; for that Act authorizes no transfer of any of the powers of the Boards to the Legislature, or to any other persons. It would have been quite a different question, if the Legislature had undertaken merely to alter the term of office of the future Presidents chosen by the Boards, with a grant of power to remove such future Presidents at the pleasure of the Boards. The wisdom of such a provision might be more than doubtful. The authority to make it, might perhaps be more clear.

But it is said, that the Boards have assented to the Act, and have adopted it; and it has, therefore, become binding upon the College. I think, that the argument is not correct.

The Boards have not adopted it; they have merely "*acquiesced*" in it, a phrase evidently chosen, *ex industriâ*, by the Boards, as expressive of mere submission to the legislative will, and not of approbation; a course, which might naturally be adopted to avoid a direct collision with the Legislature, and as a respectful appeal for a future revision of the Act by the Legislature itself. But if the acquiescence of the Boards could be construed into an approval of the Act, (as, I think, it ought not to be,) still, that approval cannot give effect to an unconstitutional Act. The Legislature and the Boards are not the only parties in interest upon such constitutional questions. The People have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers; and no private arrangements between such parties can supersede them.

Independent, however, of this general ground, there is another of great weight and importance; and that is, that President Allen was in office under a lawful contract made with the Boards, by which contract he was to hold that office during good behaviour, with a fixed salary and certain fees annexed thereto. This was a contract for a valuable consideration, the obligation of which could not, consistently with the Constitution of the United States, be impaired by the State Legislature. The Act of 1831, directly impairs the obligations of that contract. It, *ipso facto*, takes away from President Allen the tenure, by which he held his office; and removes him from it. Now, it was as little competent for the Legislature to exercise this authority, as it was for the Boards of the College. The President, holding his office during good behaviour, could not be removed from office, except for gross misbehaviour; and then only by the Boards, in the manner pointed out in the original charter. It is no answer to say, that the President personally assented to the proposition to

clothe the Legislature with an authority of this sort, *in futuro*. However indefensible any act might be on his part, by which he should surrender for all his successors the tenure of office during good behaviour, which he should yet retain for himself, (a design which I am very far from imputing to him;) still the Act of June, 1820, could in no legal sense be construed to apply to past contracts. It could operate only in relation to powers to be exercised by the Boards, *in futuro*. And, at all events, he has not assented to the Act of 1831; and has resisted it, as in his opinion oppressive, vindictive, and unconstitutional.

In every view, therefore, in which I have been able to contemplate this subject, it seems to me, that the Act of 1831 is unconstitutional and void, so far as it seeks to remove President Allen from office. The Legislature could not constitutionally deprive him of his office, or of his right to the salary and perquisites annexed thereto.

The other question in the case is of minor importance to the parties; but still in a legal point of view it is entitled to grave consideration. From what has been already stated, President Allen is *de jure* in office; and as there is no pretence to say, that he has not always been ready to perform the duties of his office, he is entitled to recover against the Corporation the entire emoluments, annexed by his contract to the office at the time, when he accepted it, or which have since been annexed to it. But the present suit is not brought against the Corporation. It is against the Treasurer of the Corporation personally, as having received money for the use of the plaintiff. To justify a recovery, then, it must be clearly made out, that there is in his hands money, which has been specifically appropriated to, and belongs to the plaintiff, as President of the College. As to this part of the case, there may arise a distinction between the salary, and the fees

of office. Since the College Commencement in 1831, no money has come into the hands of the Treasurer, which by any order of the Board has been specifically directed to be paid to the President of the College, *eo nomine*, or to the plaintiff. Before that period the salary was payable quarterly, and was accordingly paid by the Treasurer, under the general vote of the Board already stated. It was a duty incumbent upon him so to do, in order to carry that vote into effect; and if funds existed in his hands sufficient for the purpose, there was an implied appropriation of those funds for that purpose. But the acquiescence of the Boards at that period in the Act of the Legislature of 1831, and their information to the plaintiff of that acquiescence, and their proceeding to elect a new President, (though ineffectual,) amounts, as I think, to an implied revocation of the authority to pay over any future salary to the plaintiff, as President. They treated him, as no longer in office, and had a right to take from their Treasurer (who is but their agent) the authority to pay to the plaintiff any farther salary, and to assume upon themselves all the consequences of a breach of their contract. But as to the fees for academical and medical degrees, the posture of the case is somewhat different. It is true, that the Act of 1831, in the second section declares, that the fees paid for degrees shall thereafter be paid into the treasury for the use of the College. But, so far as regarded the plaintiff, who, by his contract and the by-laws, was entitled to those fees, the Act was inoperative. Besides; the Boards have never acquiesced *de facto* in this part of the Act. On the contrary, in September, 1832, there was an express refusal to change the former by-laws, by which "candidates for either degree shall pay five dollars each to the Treasurer for the use of the President;" so that those by-laws, at least so far as the plaintiff is concerned, remain unrepealed; and

the fees received by the Treasurer for such degrees, have been expressly received by him for the use of the President. They are strictly money had and received for his use; and as the plaintiff still continues *de jure* President, he is entitled to them, unless there is some stubborn rule of law, which stands in his way.

It is a very clearly established principle of law, that if one man receive money, which ought to be paid to another, or belongs to him, this action for money had and received will lie in favor of the party, to whom of right the money belongs. So it is laid down by Lord Chief Justice *Willes*, in *Scott* v. *Surman*, (Willes R. 400;)[1] and the doctrine has ever since been adhered to. Nor is there any difficulty in maintaining such a suit, simply because it involves a trial of the title to office, if the party has once been in possession. Upon this point nothing more is necessary than to refer to *Arris* v. *Stukely*, (2 Mod. R. 260,) and *Boyter* v. *Dodsworth*, (6 Term R. 681.)[2] It seems to me, therefore, that, as to the fees actually received for degrees by the Treasurer for the President, the suit is maintainable, and, as to the salary, not.

I have now finished all that is necessary to be said for the decision of this cause. But I cannot dismiss it without expressing my regret, that it has ever come before the Court, and that I have been deprived of the assistance of my learned

[1] See also *Woodward* v. *Aston*, Freeman's R. 429. *Mayor of London*, v. *Gorey*, Id. 433. *Howard* v. *Wood*, Id. 474, and note of Mr. Smirke.

[2] *Green* v. *Hewett*, Peake, N. P. R. 182. *Rains* v. *Commissioners of Canterbury*, 7 Mod. R. 147. *Powell* v. *Milbank*, 1 Term R. 399, note. *Saddler* v. *Evans*, 4 Burr. R. 1984. *Drew* v. *Fletcher*, 1 B. & Cres. R. 283. *Lightley* v. *Clouston*, 1 Taunt. R. 115, *per Heath* J. *Hall* v. *Marston*, 17 Mass. R. 575. *Hearsey* v. *Pruyn*, 7 John. R. 179, 182.

brother, the District Judge, in deciding it. If this Court were permitted to have any choice, as to the causes, which should come before it, this is one of the last, which it would desire to entertain. But no choice is left. This Court is bound to a single duty, and that is, to decide the causes brought before it according to law, leaving the consequences to fall as they may.

It is impossible, in any aspect of the case, not to feel, that the decision is full of embarrassment. On the one hand the importance of the vested rights and franchises of this literary institution has not been exaggerated; and on the other hand the extreme difficulty of successfully conducting any literary institution without the patronage and cordial support of the government, and under a head, who may (however undeservedly) not enjoy its highest confidence, is not less obvious. But these are considerations proper to be weighed by others, who possess a discretion and voice in a fit adjustment of controversies of this sort. To the Court is left the humbler, but unenviable task of pronouncing a judgment, such as a just reverence for the law, and a conscientious discharge of its duty, impose upon it.

The verdict taken for the defendant must, pursuant to the agreement of the parties, be set aside, and a verdict entered for the plaintiff, for such a sum, as shall be ascertained by an auditor to be appointed by the Court, as due to him for the fees for degrees, received by the defendant for the use of the President.

Isaac Dobson v. Benjamin Campbell.

If the declaration upon an assignment of a patent right omit to state, that the assignment has been duly recorded in the State Department, the defect is cured by a verdict for the plaintiff.

Where a fact must necessarily have been proved at the trial to justify the verdict, and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof.

Case for infringement of a Patent Right for the double reflecting baker, brought by the plaintiff, as assignee of the patent. The declaration, after alleging the obtaining of a patent by one Williston, proceeded: "The said Williston did always, from the time of making and granting the said Letters Patent, as aforesaid, exercise and enjoy the right, privilege, and liberty aforesaid, to wit, at Norwich aforesaid, until the 20th day of June, in the year of our Lord one thousand eight hundred and thirty-one, to great profit and advantage, when the said Williston, for a valuable consideration, *by his writing under his hand of that date*, sold and conveyed all his right and claim in said patent right to one John Robinson of Norwich aforesaid; as by said assignment in writing, in Court to be produced, will fully appear; *whereby* the said John Robinson, as assignee of said Williston, became and was the true and lawful owner of said right, so as aforesaid patented, with the full and sole power in him, his heirs, administrators, and assigns, to make, use, and vend to others to be used, the said new and useful improvement, agreeably to the Statutes aforesaid recited. And the plaintiff farther says, that the said Robinson did always, from the time of making and executing the said assignment as aforesaid, *exercise, use, and enjoy the right, liberty, and privilege aforesaid*, to wit, at Norwich aforesaid, until the twenty-ninth day of July, in the year of

our Lord one thousand eight hundred and thirty-one, when the said Robinson, by *assignment of that date under his hand and seal*, and in Court to be produced, for a valuable consideration therein expressed, did grant, sell, and convey all his right, title, and interest in the said letters patent, and improvement therein specified and set forth, to the plaintiff, his heirs, and assigns. And the plaintiff farther says, that he, the said plaintiff, from the time of making and executing said last mentioned assignment, did *use* and *enjoy* the right, liberty, and privilege aforesaid, to wit, at Norwich aforesaid, to wit, at Portland and Bangor in said District of Maine, and has *exercised*, *used*, and *enjoyed* the same right, liberty, and privilege *to the day of the purchase* of this writ *by himself and servants, and his deputies, to his great profit and advantage*, to wit at Portland and Bangor. Yet the defendant," &c.

At the trial upon the general issue the plaintiff obtained a verdict; and now *Sprague* for the defendant moved in arrest of judgment, upon the ground, that the declaration was substantially defective.

He argued as follows. The case presented is not a case of a *title defectively stated*, but the *statement of a defective title*. There is a material difference in the allegations with respect to the rights of Robinson, the first assignee, and of the plaintiff, the second assignee. As to Robinson, it is indeed alleged, that "he became and was the true and lawful owner of said right," which general assertion of title might have been sufficient after verdict, if he had not himself narrowed it, by setting forth specifically what his title was, namely, the *assignment only*, adding, "*whereby* he became and was," &c. This is alleged to be his title; the *conclusion* is *whereby*, &c, excluding the recording and all other facts, but such as are stated, as constituting title. It is the statement of *a defective title*, if any other requisite, not specified before the *whereby*, is essential. Such a requisite is the *recording*.

The allegation, that Robinson "*used, exercised, and enjoyed*" the right *aforesaid*, adds nothing to avail the plaintiff. It is "that *from the time* of making and executing the said assignment, *as aforesaid, did exercise*," &c. 1st. *It is mere use*, which might be with the *temporary assent* of the patentee; it certainly does not embrace a *recording*, &c. 2d. The *right aforesaid*. 3d. From the time of assignment, excluding any other act or interval of time. 4th. Assignment *as* aforesaid. In the statement of the title of the plaintiff, the important allegation, that he "became and was the true and lawful owner of said right," is *wholly omitted*; and no such allegation, nor any allegation, that the plaintiff ever became the lawful owner of the right, is to be found in the declaration. The title, which the plaintiff has from Robinson, is stated, namely, a written assignment under seal. This is a *defective title*; the recording in the office of the Secretary of State being essential, and made so expressly by Statute. (Stat. of 1793, ch. 156, § 9.) The allegation, that the plaintiff "*used, exercised*, and *enjoyed*," is subject to the same remarks, that have been applied to Robinson's title, with this striking addition, that the plaintiff adds, that said *use*, &c. was "by himself, and *servants*, and *deputies*," demonstrating, that it is the *uses merely*, that is intended, not the legal *title*. The following cases relate to the point under consideration. *Kingsley* v. *Bill et al.* 9 Mass. R. 198. In error after verdict, omission to allege publication of an award; *Stetson* v. *Tobey*, 2 Mass. R. 521, arrest of judgment; *Commonwealth* v. *McCurdy*, 5 Mass. R. 324, *ib.*; *Brent's Executors* v. *Bank of the Metropolis*, 1 Peters S. C. R. 89–93; *Lynn* v. *The Mechanics Bank of Alexandria*, 1 Peters S. C. R. 67, 68; *Executors of Fulton* v. *Myers*, 4 Wash. C. C. R. 220; an averment more specific than necessary must be proved *as made*, *The Friendship*, 1 Gall. R. 45–51; *Renner* v. *Bank of Co-*

lumbia, 9 Wheat. R. 581; *Wilson* v. *Lenox et al.*, 1 Cranch R. 195. The true rule is laid down by *Buller* J., in *Spieres* v. *Parker*, 1 T. R. 145; and also, in other language, in *Smith* v. *United States*, 1 Gall. R. 267.

In the case before the Court, the verdict does not find or assert the fact of *recording* the assignments, because it is nowhere alleged by itself, nor comprised in any other allegation. All *the facts* alleged in the declaration may be true, and yet no record ever made. The allegation, that there was an "assignment," or that the right was "assigned," does not embrace a *recording*. The assignment is one thing, the *recording* of that assignment is another, and so clearly distinguished by the Statute. It is not like stating, that the plaintiff had a grant by deed, without stating a *delivery*; delivery, being of the essence of a *deed*, may be considered as comprised in the allegation of a grant, or conveyance by deed. It is perhaps more analogous to the recording of a levy of an execution on real estate, or the registry of a deed. *Calvert* v. *Bovill*, 7 T. R. 519, 522, 523; decided on the ground, that a statement of particular facts excludes the idea, that other facts are embraced; *Bishop* v. *Haywood*, 4 T. R. 470–472, *per Buller* J.; *De Costa* v. *Clarke*, 2 Bos. & Pull. R. 257–259.

Fessenden and *Greenleaf* for the plaintiff. The point to which we shall confine ourselves is, that the plaintiff has not directly averred in his declaration, that the assignments, from the original inventor to Robinson, and from Robinson to the plaintiff, were *recorded*, as required by the fourth section of the Statute of 1793, and on this ground it is moved to arrest the judgment *after verdict*.

In *Smith* v. *The United States*, 1 Gall. R. 267, the Court say: "It is a general rule, that wheresoever it may be presumed, that any thing must of necessity be given in evidence,

the want of mentioning it in the record will not vitiate it, after a verdict."

In *Jackson* v. *Pesked*, 1 Maule & Selwyn R. 237, Lord *Ellenborough* says: "Where a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict."

In Sergeant *Williams's* Notes to 1 Saunders R. 228, *a*, it is said, in relation to the same subject, "that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts, so defectively or imperfectly stated, or omitted, and without which it is not to be presumed, that either the Judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law."

It is believed, that an examination of the case at bar, upon the principles above stated, will result in establishing the sufficiency of the plaintiff's declaration, in the present stage of the case.

The section of the Statute before cited renders it necessary, that an assignment should be recorded, in order that the assignee may "stand in the place of the original inventor, both as to right and responsibility." Thus the recording is by the words of the Statute rendered necessary, in order that the assignee may support an action for the breach of the Patent, in his own name. Without proof of such recording, a paper purporting to be an assignment *could not be given in*

evidence. It would, in fact, be no assignment within the words of the Statute. The same principle applies to this, as to an instrument required by law to be stamped. If not stamped, it could not be given in evidence, and this is all the effect which results from it. The fact, that such an instrument was "stamped," is never averred.

In relation to the assignment to Robinson, it is averred, that Williston, by his writing, "sold and *conveyed all his right,*" &c., "as by said assignment, &c., will fully appear," "whereby the said Robinson became and was the true and lawful owner of said *right.*"

Now, by the express words of the Statute, the recording was indispensable to *convey the right.* "Stand in the place of the original inventor" are the words of the Statute; and the allegation is, that Williston conveyed "*all his right.*"

Again, the allegation is, that *thereby* the said Robinson became and was "the true and lawful owner." He could not become so, unless said assignment had been recorded. Again, it is averred, that he exercised the *right,* liberty, and privilege *aforesaid.*" What right, liberty, and privilege? *That* which was secured to Williston by the patent, who had conveyed "*all his right*" to Robinson.

Another averment here made is, that, by said conveyance, Robinson received "the full and *sole* power" to make, vend, &c. Had not the requisite of recording been complied with, he could not have received *such* a power. Any one might have exercised it, so far as he was concerned, without remedy for him.

Again, he became seised of this power "*agreeably to the Statutes aforesaid recited.*" By these Statutes *recording* is essentially requisite. This averment, it is believed, would be sufficient of itself, had the others, above referred to and relied on, been wanting.

The averments in the plaintiff's declaration, touching the assignment of Robinson to the plaintiff, are substantially the same. It is averred, that Robinson conveyed "*all his right,*" and that in consequence the plaintiff did use and enjoy the "*right,*" and has used it.

It will be noticed, that, in the assignment of Williston to Robinson, is the expression, "the right so as aforesaid patented," and then in the assignment to the plaintiff is found the expression, the "*right, &c., aforesaid,*" referring to the *right* mentioned in the first assignment. This *right* is in both instances alleged to be *conveyed. All the right* is *conveyed* to Robinson, and then *all the right* is *conveyed* to the plaintiff. If, then, the Statute makes the *recording* necessary to the *conveyance,* these allegations are of themselves sufficient.

At all events, these allegations are sufficient *after verdict.* These assignments *could not have been given in evidence, had they not been recorded,* and the fact, that they were so, is not denied.

In the language of the Court, in the case cited from Gallison, the recording "must *of necessity* have been given in evidence."

It was "so essentially necessary to be proved, that, *had it not been given in evidence, the jury could not have given such a verdict.*"

The issue joined was "*such as necessarily required, on the trial, proof of the fact.*" Without such proof, "the Judge could not have directed the jury to give, neither could the jury have given the verdict."

The general issue being pleaded and joined, the "*right*" claimed by the plaintiff was directly *denied,* and *it was necessary for him to prove any thing rendered necessary by the Statute to the existence of such right;* and the existence of such right is found by the verdict. See also *Hitchins* v. *Ste-*

vens, 2 Shower R. 283, and the other cases cited in the note of Sergeant *Williams* before referred to.

Story J. We are of opinion, that the motion in arrest of judgment ought to be overruled. We accede to the doctrine stated at the bar, that a defective title cannot after verdict support a judgment; and therefore it constitutes a good ground for arresting the judgment. But the present is not such a case; but is merely the case of a good title defectively set forth. The defect, complained of, is the omission to state, that the assignments, on which the plaintiff's title is founded, were duly recorded in the office of the Department of State, which is made essential to pass the title of the original patentee by the fourth section of the Patent Act of the 21st of February, 1793, ch. 55. The general principle of law is, that, where a matter is so essentially necessary to be proved, to establish the plaintiff's right to recovery, that the jury could not be presumed to have found a verdict for him, unless it had been proved at the trial, there the omission to state that matter in express terms in the declaration is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend it. This was the doctrine of Lord *Ellenborough* in *Jackson* v. *Pesked* (1 M. & Selw. R. 234); and it is very elaborately expounded by Mr. Sergeant *Williams* in his learned note to 1 Saunders R. 228, *a*. The other authorities cited on behalf of the plaintiff are to the same effect. Now, it seems to us, that taking the whole declaration together, (however inartificially drawn,) the plaintiff sets up a title to the patent right by assignment, and an enjoyment and use of the right under that title, and that he has been injured in that right under that title, by the piracy of the defendant. This cannot be true, nor could a verdict for the plaintiff have been found by the jury, if the deeds of assignment had not been duly recorded; for, unless that was done,

nothing would pass by the deeds. The cases of *Hitchins* v. *Stevens*, (2 Shower R. 233,) and *McMurdo* v. *Smith*, (7 T. R. 518,) cited at the bar, seem to us very strongly in point. So is *France* v. *Tringer*, Cro. Jac. 44.

There are stronger analogous cases in equity; for it has been held, that if a feoffment is stated without any averment of livery of seisin, or a bargain and sale without stating an enrolment, it is not a good cause of demurrer, but the Court will intend it perfect.[1] As to livery of seisin, it is far from being certain, that, if a *feoffment* is in terms pleaded, it is necessary, even at law, to aver it, since it is implied.[2]

Upon the whole, judgment must be entered for the plaintiff according to the verdict.

Judgment accordingly.

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[1] *Harrison* v. *Hogg*, 2 Ves. Jun. R. 323, 328.

[2] See Co. Litt. 303, b. *Throckmorton* v. *Tracy*, Plowden R. 144. See *Spieres* v. *Parker*, 1 T. R. 145, *per Buller* J. 1 Saund. R. 228, *a*, *Williams's* note.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1833, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

THE SCHOONER BOSTON AND CARGO, EZEKIEL FOSTER AND OTHERS, CLAIMANTS.

In a libel for salvage all the parties should be inserted and brought before the Court.

Libels in Admiralty, especially those for salvage, are usually too loosely framed.

They should state the subject matter in articles, with certainty and precision, and with averments admitting of distinct answers.

The answer should meet each material allegation of the libel with an admission, a denial, or a defence.

No evidence is admissible except it be appropriate to some of the allegations in the libel or answer.

In Admiralty proceedings a supplementary libel alleging new matter, and an answer thereto, may be filed after appeal, at the discretion of the Court.

In case of a supplementary libel being filed after closing the testimony on the original libel in prize causes, the new testimony taken must be applicable merely to the new allegation; but in other causes this rule is much relaxed.

Since the Act of March, 1803, ch. 93, in Admiralty, as well as Equity cases, carried up to the Supreme Court by appeal, all the evidence goes with the case, and it must accordingly be in writing.

In a libel *in rem*, against a vessel or cargo for salvage, the underwriters, not having accepted an abandonment, are not proper parties.

A stoppage to save the crew of a wrecked and sinking ship, whose lives are in jeopardy, is justifiable, and is not a deviation, that discharges underwriters; but a delay to save property is such a deviation.

Where the master and crew had left their vessel in a sinking condition, and taken to the long boat, and were picked up by another vessel, while yet in sight of the wreck, the vessel and cargo, thus left, are considered, in Admiralty, as derelict.

On appeal in salvage cases, the Court of Appeal does not alter the amount of salvage upon slight grounds, or inconsiderable differences of opinion.

The right of salvage is forfeited by embezzlement on the part of the salvors.

Embezzlement in port is a forfeiture no less than at sea.

Embezzlement by the salvors, after the property is put into the hands of the Marshal, is a forfeiture of salvage; and that, whether the custody of the property be at the time given to the salvors or not.

The rules of the common law, as to the competency and incompetency of witnesses, are adopted in the Admiralty, in the exercise of its jurisdiction as an Instance Court.

The case of salvage is an exception to the rule, as to the incompetency of witnesses on account of interest. The salvors are, from necessity, witnesses as to facts occurring at the time of the salvage service; but only as to such facts.

The testimony of persons, who are parties to an Admiralty suit, ought to be taken under a special order of the Court showing the cause, that the Court may in its order limit the inquiries to matters within the exception to the rule, that parties are not witnesses.

In a salvage suit in Admiralty the salvors, being parties to the suit, are not competent witnesses as to facts occurring in port after the property is brought in.

The testimony of interested witnesses weighs little in opposition to that of those disinterested.

STORY J. This is a suit for salvage, brought before the District Court by an original proceeding *in rem* against the schooner Boston, of Eastport, and cargo.[1] The original libellants were the master and owners of the schooner Magnolia of Hallowell, in the State of Maine, asserting a claim as salvors. By a supplemental libel, the crew of the Magnolia were brought before the Court as salvors, as in strictness they ought to have been by the original libel, either by name, or by a description of their character. The libel, whether filed by the master, or owners, or both, should have been in behalf of themselves, and the officers and crew of the saving ship. I take this opportunity of adding, that the manner, in which li-

[1] Salvage proceedings may as well be by process *in personam* as *in rem*. *The Hope*, 3 Rob. R. 215. *The Trelawney*, 3 Rob. R. 216, note.

bels of all sorts, and especially of salvage, are usually framed, is quite too loose and general. They should state the matter with all due certainty and precision, (though not indeed with the nicety of the common law proceedings,) in distinct articles, each propounding, or, as the Admiralty phrase is, articulating some material allegation, capable of a distinct answer and proof, if controverted; and the answer should accordingly reply to each article by a clear and exact admission, or denial, or defence to the matter of it. In this way we should arrive at that distinct knowledge of the real points of controversy, which is so desirable for the Court, and to that just regard to the rules of Admiralty pleadings, which is so essential to vindicate its equity, and facilitate its practice. But to return to the case. A claim was interposed by Ezekiel Foster, of Eastport, as owner of the Boston, and by the Suffolk Insurance Company, as underwriters on the vessel, and by other persons, as claimants of the cargo. The claims admitted the salvage service; and the question therefore was reduced at the hearing in the District Court to the mere consideration of the amount to be awarded to the salvors. The decree of the District Court awarded to them two fifths of the value of the schooner and cargo; one third of the salvage was given to the owners of the Magnolia; the residue was divided into ten shares, of which the master was to receive five, the mate two, and the remaining three were distributed equally among the crew, consisting of three persons. No appeal was interposed by the libellants, either as to the amount of salvage, or as to the distribution; and, therefore, as to the latter, there is now no controversy. But an appeal was interposed by the claimants generally; and of course this brings the amount of the salvage regularly in question before the Court.

After the appeal, new facts, material to the defence of the claimants, and indeed constituting a new defence as to some

of the salvors, having come to the knowledge of the claimants, it became necessary to open the cause, so as to let them in. Nothing is clearer, than that in the then posture of the allegations no proofs were admissible, except to facts put in issue by them; for in all Admiralty proceedings the decree must be *secundum allegata et probata.* It is not sufficient, that there are facts proved, which might have a material bearing, unless there are allegations suited to bring them as matters of plea and controversy before the Court. The charge, thus newly brought forward by the claimants, is of a very grave nature, that of a deliberate embezzlement of the salvage property by the master, officers, and crew. And it being clearly established, that the knowledge of the circumstances had not been brought home to the claimants until after the decree of the District Court, this Court had no difficulty, at a former hearing, in allowing the claimants to file a supplementary answer and defence on this point; for it is the well known usage of Admiralty Courts, even after an appeal, in fit cases, in their discretion, to allow either party to file new allegations and proofs; *non allegata allegare, et non probata probare.* There is a restriction, too often forgotten in practice, *modo non obstet publicatio testium,* the effect of which is to exclude new testimony to the old articles, where any has been already offered, and to confine it to the new articles, or to those of which no proof was formerly given.[1] This restriction is founded upon the same principles as the Chancery practice, not to admit, after the publication of the testimony, any new proofs; and was probably derived from a common source, the civil law.[2] In the actual frame of our laws the restriction is in many cases overlooked r abandoned; but it is still re-

[1] 2 Browne, Civil and Adm. Law, 500, 501. 2 Ibid. 436, 437.
[2] Ibid.

tained in prize causes, where further proof stands upon the direct order of the Court itself.

The supplemental answer having been filed, and stating (as it properly should) in distinct articles the charges of embezzlement, though not with so much certainty as is desirable, the libellants filed a defensive allegation, repelling the charges throughout. Upon the issue thus framed, new testimony was taken; and by the direction of the Court it was taken under commission and reduced to writing. And I beg here to repeat, what was stated at the bar at the time, but seems not to have been generally understood in practice; that since the Act of the 3d of March, 1803, ch. 93, in Admiralty causes, as well as in Equity causes, all the evidence originally taken in the Circuit Court, in cases capable of appeal, must be transmitted to the Supreme Court; which cannot be, unless the same is reduced to writing; and no new supplementary evidence can be received in the Supreme Court, except in Admiralty and prize causes; which rule presupposes, that all the old evidence is already in the record.

The cause has now been argued most elaborately upon all the facts touching both points; first, the amount of salvage; and secondly, the charge of embezzlement. If the latter is made out, it is not pretended to go to the whole extent of the salvage; but only to the shares of the guilty parties. And, inasmuch as the seamen have been examined as witnesses by the claimants, upon the implied faith, that their testimony fully given shall not be used to prejudice their claim to salvage, it is understood, that the charge of embezzlement does not extend to them; but is confined to the master, (who is also a part owner,) and the mate.

It is observable, that the Suffolk Insurance Company have asserted a claim in this Court, as underwriters upon the schooner Boston. But their claim nowhere alleges, that any abandonment has been made to them; and if it had, unless

they had accepted it, they would have had no right *in rem*. There is, indeed, in a prior interlocutory proceeding upon petition for the delivery of the schooner upon an appraisement, an allegation by the Company, that there has been an abandonment made to them, but *not accepted*. This would not help the deficiency in the averments, if the claim were otherwise sufficient. But of itself, it proclaims the Company out of Court. Nothing is clearer in the course of Admiralty proceedings, than that no person can make himself a party claimant to a proceeding *in rem*, except he be the actual owner thereof. It is not sufficient, that he may have an interest in the controversy. He must have an interest in the property itself, in a legal and technical sense; otherwise he has no *persona standi in judicio*. The claim, therefore, so far as respects the Suffolk Insurance Company, must be dismissed, as *res inter alios acta*, as to which the Court can exercise no jurisdiction, and take no notice, in this case.

The claimants have made some suggestions in regard to the distribution of the salvage. But it appears to me, that this is a subject with which they have, strictly speaking, no right to intermeddle. They have an interest to lessen the amount of salvage; but here their interest ceases. How it should be distributed, is matter of consideration for the salvors, and for the Court, in the discharge of its own appropriate duties. If, indeed, the charge of embezzlement is made out, the claimants are entitled to withhold salvage from the offenders. But as to the distribution of the salvage actually awarded to others, they have no legal interest or concern.

Having disposed of these preliminary matters, I now come to the consideration of the first point in the cause, the amount of salvage. The facts of the cause upon this point are these. — The schooner Boston, with a cargo of flour and corn, and some bales of feathers on board, being bound on a voyage

from Baltimore to Portland, was, on the night of Wednesday, the 25th of September, 1832, run down by a topsail schooner, it being dark and hazy, and the wind blowing heavy from the northwest. The Boston filled with water in about ten minutes, and the schooner, by which she was run down, kept on her way. Finding the Boston in a sinking condition, as was supposed, the master and crew, being seven in number, took to the long boat, and left her as soon as possible. In about an hour after leaving her, and being about two or three miles distant from her, they came across the Magnolia, then on a voyage from New York to Boston, and got aboard of her about one o'clock in the morning. It was then still blowing very hard. The Magnolia had just before been injured by some unknown vessel, which had run afoul of her, and she was leaking badly, so as to require one person at the pump until the weather moderated, when it was found, that the covering plank on her starboard bow was started, and her timber heads were stove in. Capt. Davis (the master of the Magnolia), at the suggestion of the master of the Boston, continued to lie to under a three-reefed mainsail and a foresail, to wait and see the situation of the Boston; and at day break, about six or eight miles distant, they descried a vessel from the mast head, (which proved to be the Boston,) and bore away for her, and run down for her about S. E. or S. S. E., and came up with her about six o'clock in the morning. Capt. Davis sent his boat with some men on board. The Boston was then full of water, and the sea breaking over her, the wind still continuing to blow hard. The opinion of the masters of both the vessels at that time was, that the Boston would roll over and sink, and that she was in danger of sinking every hour. It was thought best to strip her of her sails and rigging, and whatever else could be saved; and accordingly Capt. Davis and his crew went on board, and brought

back to the Magnolia her foresail, jib, flying jib, and some rigging. The Magnolia continued by the Boston until two or three o'clock in the afternoon of the same day, when the wind began to abate, and Capt. Davis concluded then to hitch the Boston to his own vessel by a chain cable and hawser, and take her in tow into port. She was then about twenty or thirty miles distant from Cape Cod, and from the time she was first seen until taken in tow, she had drifted out to sea about ten miles, and towards Nantucket Shoals. She was accordingly taken in tow, and arrived in Boston harbour on Saturday, the 28th of September, about noon, being all this time full of water; and was towed up to the wharf by a steamboat.

Such are the most material facts, as they appear in the evidence, and principally as they are stated by the master and mate of the Boston. And upon this posture of the facts it is difficult to escape from the conclusion, that it is a most meritorious case of salvage. At the time when the salvage service was performed, the Magnolia was herself in a somewhat crippled state, and she and her cargo were of the aggregate value of fifteen thousand dollars. Beyond all question, at least in my opinion, it was the duty of the master of the Magnolia to interrupt his voyage for the purpose of taking on board the crew of the Boston in their suffering state, for the safety of their lives. It was a duty thrown on him by the first principles of natural law, the duty to succour the distressed; and it is enforced by the more positive and imperative commands of Christianity. The stopping for this purpose could not, in my judgment, be deemed by any tribunal in Christendom a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby. But beyond this there was no supervening

or imperative duty. The master was under no obligation to lie by in order to save property, or to delay the proper progress of the voyage by gathering up the fragments of shipwreck, or other perils of the sea. Any stoppage for such purposes would of itself amount to a deviation; and any going out of his course for such a purpose, being wholly unauthorized, would discharge the underwriters from all future responsibility. But the maritime law, looking to the general benefit of commerce, upon a large and comprehensive policy, does not prohibit the master, under such circumstances, from deviating to save property in distress, if he deems it fit in a sound exercise of his discretion. As between himself and his owners, the usage of the world has clothed him with this authority; and in return for such extraordinary hazards it has enabled the owners to partake liberally in the salvage awarded for the meritorious service, when it is successful.

It has been said, that the present is not a case of strict derelict, in the sense of the maritime law. But I rather doubt that position, if the true meaning of derelict in that law be, as I take it to be, a thing found abandoned or deserted on the seas. And it is clear in this case, that the abandonment, though voluntary, was without any intention to return.[1] The case was treated by the master and crew, as one of irretrievable foundering, when they left the vessel in the long boat. The subsequent change of opinion and action under new circumstances cannot affect the nature of the original transaction. The original *animus non revertendi* was not done away by the new enterprise, under the auspices of the Magnolia.

But the case, in point of merit, is in no degree changed, if it should be deemed not a case technically of derelict. It

[1] See *Rowe* v. *The Brig* ——, 1 Mason R. 372.

approaches as near to one, if it be not one, as can well be conceived. It is a case of *quasi* derelict, where all hope of recovery, for the time being, was entirely abandoned. The vessel was certainly in a situation of extreme danger and distress. She was water-logged and drifting to sea, and, as the testimony states, she was drifting in a direction toward the South Shoal of Nantucket, which was at but a short distance; and, unless relief was promptly obtained, there was imminent danger of her being totally lost on that shoal. If the weather had continued boisterous, with any thing like the severity of any of the customary equinoctial gales in September, her fate, as a lost vessel, was inevitably sealed. She was, then, snatched from the very jaws of destruction by the enterprise and prompt assistance of the master and crew of the Magnolia. The circumstances of this case are not at all like those of the Schooner Emulous, Simpson, &c., claimants in this Court, alluded to at the bar.[1] There the hazard was not for the moment so imminent, nor the means of other succour so distant, doubtful, or unattainable. If succour had not been given by the Magnolia, there is every reason to suppose, that none could at a subsequent period have been effectual; for every hour of delay was fraught with additional danger, from the nature of the cargo, the situation of the vessel, and the drift of the currents. The rule of the maritime law here is, as in other cases, where public policy points to promptitude and zeal in rendering services, *Bis dat, qui cito dat.*

In cases of derelict, the well-known and favored rule in ordinary cases is, to allow one half as salvage. Although it is not an inflexible rule, yet it is rarely deviated from, except in cases of very extraordinary value, or of very slight hazard. The value of the Boston and cargo is not so large as to call

[1] Ante, p. 207.

for any deviation from the common rule on that account; for it does not exceed the sum of nine thousand four hundred dollars; the value of the vessel being $4500, and that of the cargo, $4894·70.

The hazards encountered by the salvors were not, indeed, very great, beyond the putting the Magnolia and her cargo at the risk of the owner of the vessel. It is said, that the Boston was so hitched to the Magnolia by the chain cable, that from want of suitable implements to unlock the cable, in case the Boston had gone down, the Magnolia must have shared a common fate. If this were so, it ought not to enhance the measure of salvage; for the master of the Magnolia ought to have guarded against any such probable danger, and he cannot avail himself of his own negligence to found any additional title to salvage. On the other hand, I should be sorry to lay down any doctrine, by which it should be supposed, that if, in a highly meritorious case of salvage, of derelict, or *quasi* derelict, there was subsequently no great hazard or labor of an exhausting nature, the salvage was therefore subject to great diminution. I should fear, that such a doctrine would be found as mischievous in practice, as it would be unjust in principle.

Upon questions of this nature, a large discretion must of necessity belong to the public tribunals. It is of great importance, as far as it can be done, to avail ourselves of fixed rules and habits in the administration of this delicate duty; and not to deviate from them, except upon urgent occasions. The rule of salvage in cases of derelict usually is, (as has been said,) to give one half; and it has rarely been below two fifths of the value of the property. The learned Judge of the District Court has adopted this latter proportion, and I am unable to see any solid ground of objection to this exercise of judgment.

There is another rule, which has been repeatedly enforced in this Court, and in the Supreme Court of the United States, in cases of this nature; and that is, not to encourage appeals upon slight grounds of difference in cases or in opinions. Probably no two minds, acting often independently of each other, would always arrive at exactly the same conclusion, as to amount, in cases of discretionary salvage. Yet each might act for itself with the utmost caution, and care, and sagacity. I have endeavoured in all cases to keep this consideration in view; and the decisions of the Supreme Court admonish me rigidly to adhere to it. Where I cannot perceive a plain and palpable departure from the true principles of salvage, I shall not feel at liberty to reverse a decree upon the mere ground, that I might not originally have awarded the same amount. In the present case, I need not put myself upon this peculiar reason; since I entirely concur in the rate of salvage given by the District Court.

We next come to the consideration of the question of embezzlement, a charge of a most serious nature, and deeply affecting the character of the parties implicated. The maritime law demands from all persons engaged in maritime concerns scrupulous good faith and uprightness of conduct. And it prescribes this most emphatically to salvors, giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence.[1] But in cases of embezzlement the law would fall short of its usual foresight, if it did not inflict a more admonitory punishment. Accordingly, it will be found, I believe, in the maritime jurisprudence of the whole world, that embezzlement by salvors, directly, or by connivance, is punished by

[1] See *Mason* v. *The Blaireau*, 2 Cranch R. 240. Abbott on Shipping, P. 4, ch. 3, § 5, p. 272, and note. *Spurr* v. *Pearson*, 1 Mason R. 104.

a forfeiture of all claim to salvage. In morals, in general justice, in sound policy, it should be so; for what can be more inhuman, or more thoroughly without apology, than to plunder the distressed, or to add the losses of fraud to the unavoidable calamities of shipwreck? In the American and English law the doctrine is fully recognised; and it is applied with an unfaltering firmness, whenever the fact is clearly established.[1]

In the present case, the embezzlement is charged to have taken place, not during the voyage, but after the arrival in port; but whether before or after the schooner and cargo were in the custody of the Marshal under the Admiralty proceedings for salvage, or before, or after, or during the time of the entering of the cargo, is left uncertain in the answer. I say, it is charged to have been in port; not indeed in the supplemental answer, as it ought to have been, (for in this respect the answer is quite too loose, and uncertain, and open to exception,) but in the argument on both sides, and in the evidence adduced to support and repel the charge. Under these circumstances, a question has been made, on the part of the libellants, whether, supposing the embezzlement to be established in proof, after the cargo was in the custody of the Marshal, it amounts to any thing more than mere theft, punishable in a criminal proceeding, but not touching in any manner the right to salvage. The argument is, that the embezzlement, to work a forfeiture, must be perpetrated by the salvors during the voyage, or at least during their possession of the salvage property; and that it cannot apply after the property is in the custody of the law. And great reliance is placed on the reasoning in the case of *The Blaireau*,

[1] See *Mason* v. *The Blaireau*, 2 Cranch R. 240. Abbott on Shipping, P. 4, ch. 3, § 5, p. 272, and note. *Spurr* v. *Pearson*, 1 Mason R. 104.

(2 Cranch R. 240,) as confirming this distinction. It is a sufficient answer to that case to say, that no decision was had upon this point. The argument was indeed pressed by the counsel; but the Court, without in the slightest degree countenancing the validity of the distinction, held, that it did not apply to the case; for, whether the asserted embezzlement took place at sea or in port, it occurred before the salvors had parted with the possession of the vessel or cargo.

I take it to be very clear, according to the course of Admiralty proceedings, that no person can come into that Court and ask its assistance, unless he can *ex æquo et bono* make out a case fit for its interposition. A Court of Admiralty is to the extent of its jurisdiction, at least in cases of this sort, a Court of Equity; and the same rule applies here, as in other Courts of Equity, that the party, who asks aid, must come with clean hands. In cases of salvage, the party founds himself upon a meritorious service, and upon the implied understanding, that he brings before the Court, for its final award, all the property saved with entire good faith; and he asks a compensation for the restitution of it uninjured, and unembezzled by him. The merit is not in saving the property alone; but it is in saving and restoring it to the owners. However meritorious the act of saving may have been, if the property is subsequently lost, and never reaches the owner, no compensation can be claimed or decreed. The proceeding need not indeed be *in rem*; for if the thing has come to the possession or use or benefit of the owner, a compensation may be equally decreed upon a libel *in personam*. So is the doctrine in *The Hope*, (3 Rob. R. 215,) and *The Trelawney*, (3 Rob. R. 216, note); and it is founded in the very nature of the Admiralty jurisdiction, which primarily acted *in personam*; and now acts *in rem*, only as auxiliary to its general authority. The compensation to be awarded, therefore, pre-

supposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach, or under the control, of the salvors. What claim could be more extraordinary than an annunciation by a salvor in a Court of Justice, that he had saved the property, and had afterwards perpetrated a gross fraud or theft upon the owner, for the purpose of withdrawing the property from him; and then to ask, in the same breath for a compensation for his labor, notwithstanding his iniquity? Such a claim, it seems to me, would be at war with the first principles of justice, and certainly with those of all maritime jurisprudence. I hold, that every act of misconduct of the salvors, as to the property, fraudulently or wantonly done to the injury of the owners, at any time before the salvage is decreed, is to be treated in the same way, as if it had occurred, while the property was in their exclusive possession. They are not responsible indeed for embezzlement or fraud committed by strangers after the property has passed into the custody of the Marshal; nor indeed before, unless it has been occasioned by their own gross negligence.

But it is not quite correct in point of fact to say, that the possession of the salvors was in this case absolutely devested by the custody of the Marshal, under the process. His possession is not adverse to that of the salvors; but the property is deemed in the possession of the law for the benefit of all concerned. It is notorious, that in practice the Marshal is accustomed to allow the salvors to have free access to the property, (at his own peril indeed,) and to place great confidence in them. In the present case, the master and mate of the Magnolia superintended the delivery under the direction of the Marshal; and the master is stated in the evidence to have watched over it during the night. He was confided in by all parties for this purpose, and if he has abused that confi-

dence, I should hope, that the law was strong enough to deal out to him a due measure of retribution. Suppose, by a connivance between the under officers of the Marshal and the salvors, embezzlement should take place after the property is in the custody of the law, what answer will it be, that they were criminally liable for the theft, but that they stood *civiliter* blameless? For myself, I cannot entertain a doubt, that salvors are responsible *civiliter* for their conduct in relation to the salvage property, so long as it is subject to the decree of the Court. It is a wholesome doctrine, and it makes it the interest, as well as the duty of salvors, to act with good faith, and never to sleep on their posts, or to make a merit of their frauds.

There is another point raised at the argument, which is necessary to be discussed before we proceed to the examination of the facts respecting the asserted embezzlement. The testimony of the master and the mate, (both of whom are libellants,) has been taken as evidence in the case, not simply to the facts occurring at the time of the salvage service; but to all the other facts in the case touching the embezzlement. Their testimony is objected to as incompetent; and its competency must now be determined on by the Court.

In general, it may be said, that the rules, as to competency and incompetency of witnesses, known to the common law, are adopted in the Court of Admiralty in the exercise of its jurisdiction, as an Instance Court. The proceedings on the prize side of the Court are of a peculiar nature, and are governed by a peculiar mode of practice.[1] Generally speaking, in Instance cases, the Court of Admiralty deems a person

[1] See 2 Wheaton R., Appx. pp. 25, 26. *The Drie Gebroeders*, 5 Rob. R. 343. *The Amitie*, 5 Rob. R. 344, note; *S. C.* 6 Rob. R. 269, note. *Robinett* v. *The Exeter*, 2 Rob. R. 267.

incompetent as a witness, who is a party to the cause, or has an interest in the event of it. The civil law has the same rule, — *Nullus idoneus testis in re suâ intelligitur.*[1] It has accordingly been held by some Judges, that seamen are not witnesses for each other in cases, where an embezzlement is charged upon all of them, to which they must contribute. This would seem to be correct, where all are parties to the suit; but if not parties, then it is a several suit, and the decree in one case has no legal bearing on that in another. In such a case the objection goes to the credit, (as an interest in the question,) and not strictly to the competency.[2]

The rule is not only regularly true in the Admiralty, that a person is incompetent, as a witness, on account of interest; but it is sometimes pressed beyond the rule of the common law. Thus, where a joint capture is set up on account of the party's being in sight at the time of capture, the testimony of witnesses of the ship, asserted to be a joint captor, is not sufficient, *per se*, to found the claim, although they are releasing witnesses.[3]

But there are some exceptions to the rule, as to interest, founded upon necessity; such as in cases of salvage, where the facts must often come in a great measure, if not exclusively, from the salvors themselves. What, for instance, could otherwise be done in cases of naked derelict, unaccompanied by any possibility of getting information from the crew of the deserted ship? The constant course of practice has

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[1] Dig. Lib. 22, tit. 5, l. 10; Domat, B. 3, tit. 6, § 3, art. 6, 8. See also *The Hope*, 2 Gall. R. 48.

[2] See *Hoyt* v. *Wildfire*, 3 John. R. 518. *Lewis* v. *Davis*, 3 John. R. 17. *Spurr* v. *Pearson*, 1 Mason R. 104.

[3] See also *La Belle Coquette*, 1 Dod. R. 18. *The John*, 1 Dod. R. 363. *The Galen*, 2 Dod. R. 19. *The Arthur*, 2 Dod. R. 423, 428.

been in salvage cases, to allow the testimony of the salvors to be taken, as to the facts occurring at the time of the salvage service, and especially where these are exclusively within their knowledge.[1] Of course, the evidence, being of interested persons, is in the nature of semi-plenary evidence only, and will weigh little, unless corroborated by other circumstances. It will be of less weight, where it leaves behind it disinterested testimony, which might be taken; and it will be greatly abated in force by opposing testimony from persons belonging to the crew of the saved ship. Cases furnishing a like analogy may be found in the Prize Court.[2] But I am not aware, that the rules of evidence have been relaxed beyond this point. Salvors have not been admitted, as far as I know, to give testimony to other facts, capable of distinct and independent proof; but are admitted, *ex necessitate*, to such matters only as found the original claim.

Indeed, in strictness, the testimony of persons, whether salvors or others, who are parties to the suit, ought not to be taken, except under a *special order* of the Court for this purpose, showing a cause, as is done in the ordinary course of Chancery proceedings. In the looseness of our practice, it is often done without such an order. But it is irregular; and it would be well, that the irregularity were corrected, as the Court might in its order limit the inquiries to matters properly within the scope of the exception.

Upon the whole, my opinion is, that the testimony of the master and the mate of the Magnolia, not being to the *res gestæ* of the salvage service, but offered as general evidence to all matters touching the embezzlement, is inadmissible in point of law, and must be suppressed. It is incompetent

[1] See the case of *The Charlotte Caroline*, 1 Dod. R. 192.

[2] *The Galen*, 2 Dod. R. 19.

upon the general principle, because it is from parties, who are interested. It is within no known exception to that principle, for it is not *ex necessitate*. It might have furnished matter fit for a special replication to the charge of embezzlement; and, if thus put in upon oath, it might have been in the nature of an expurgatory reply. It can now be deemed of no more efficiency in the cause, than a proffer of a personal examination, and denial of the charge upon oath, which has not been accepted on the other side; and which, therefore, relieves the cause from the suggestion of any voluntary concealment by the parties implicated of their own knowledge of the facts.

But, if the testimony were admissible, it could avail but little against the opposing testimony of persons not similarly situated. If releasing witnesses in the case of a common interest are heard with so much reluctance and so much distrust by Courts of Admiralty, that no decree will ordinarily be pronounced upon their uncorroborated evidence; how much more forcible must the objection be to persons, who testify under the strong sense of a present, deep, personal interest, and who stand, as it were, *in vinculis*, to disprove a charge made against them of deliberate fraud and embezzlement? The law, indeed, with the most entire justice, as well as humanity, presumes them innocent of such a charge, until it is established by credible evidence. But if it is so established, it is difficult to perceive, upon what legal ground the Court could admit the mere denial of the parties, however solemn, to outweigh what, it is bound to believe, is satisfactory proof. I do not know, indeed, whether under all the circumstances of the present case, my judgment is materially affected by the consideration, that the testimony of the master and mate is in, or out of the record. I have gone at large into the subject, more from a regard to the principles of evidence, than

from any great importance, which the testimony bears in the cause, taken under all its aspects.

The charge is, that the master and mate of the Magnolia have embezzled a number of barrels and half-barrels of flour of the cargo of the Boston, of the value of $100; and a part of the rigging, furniture, and appurtenances of the vessel itself, of the value of $200. Of course, the burden of proof of such a charge is upon the claimants; and the question is, whether it is sufficiently made out in the evidence beyond a reasonable doubt. If it is not, the Court is bound to dismiss it from its consideration; if it is made out, it is equally the duty of the Court, however painful to itself, or disagreeable to the parties accused, to pronounce the proper sentence.

Each of these items of charge will require a separate and independent consideration. And first, as to the flour. It appears by the bills of lading of the Boston's cargo, that she took on board, at New York, six hundred and seventy-four barrels and ninety-eight half-barrels of flour. When the unloading of the cargo took place at Boston, the hatches were found undisturbed; and after the unlading was completed, the Marshal received and sold at auction six hundred and fifty-two whole barrels and eighty-six half-barrels only of the flour. So, that there was a deficit of twenty-two whole barrels, and twelve half-barrels of the cargo. How is this accounted for? The master of the Magnolia admits, that he attended to the discharge of the cargo, until it was finished, and watched it after the unlading during the nights, until it was sold. It has been said at the argument, that there might have been some mistake as to the quantity of flour originally shipped in the Boston. But this, to say the least of it, is very improbable, and is wholly unsupported by any evidence. But that, which is mainly relied on, is the allegation of the master, that on discharging the cargo a good many barrels of

flour were found stove and wasted between the corn and the water. And he asserts, that the manner, in which the cargo was stowed, was in successive tiers of barrels, with corn put in between each tier to fill the scantlings; that the hold was full; that when the hatches were opened, the barrels were jammed so tight under the beams, from the swelling of the corn, that it was impossible to get them out without staving a barrel to get room, so as to use a crow-bar. Now, taking this representation either as evidence or as argument, is it fully supported by the other testimony in the case? I think I may say, that it certainly is not. It is true, that a witness, John Davis, a wood-corder and truckman, who assisted in taking care of the schooner, and in unloading the cargo, asserts, "that the flour on top was a good deal stove; many of the barrels broken. As to the rest, some were so much swollen, that the heads came out in unloading." And he adds, "I got the cooper to get three empty barrels, and we put into them the flour, that had been spilt in unloading. I think that there were three barrels. The top tier of barrels was knocked about so, that a great many of the barrels were stove to pieces, and the flour was out. I mean by that, one head was out;—some of the barrels had two heads out." This is a strong statement. He concludes by affirming, that they "found the barrels of flour more or less stove, from the top to the bottom of the cargo." But, let us see, how far this statement agrees with the testimony of the cooper himself, a man admitted to be of credit, and disinterested, who was employed in the cooperage during the whole time of the delivery. He says, that the principal part of the coopering was done, while the barrels were on the wharf. "They were piled up in tiers and some of the heads or pieces of them came out. The flour generally came out of the vessel in good order." In answer to a question, whether any of the barrels were stove

to pieces, he says, "I saw none, to my recollection; — not a barrel." He adds, that he thinks, if any had been stove, he should have seen them; and from the manner of stowing the flour with corn, he should not, under the circumstances, have expected to find any flour stove; and he concludes in answer to a question, whether he recollected any flour being gathered up, that came out of the barrels on board of the Boston, and put into other barrels, which were afterwards coopered, by saying, "I saw none." Now, it cannot be disguised, that this evidence is essentially at variance with that of John Davis. Then, there is the testimony of the Deputy Marshal, in whose custody the vessel and cargo were, and under whose direction the cargo was delivered. He says, "There were a number of barrels of flour stove," (meaning, as he says, by "stove," that the heads were partially stove in, and one or two of them were lying on the wharf with their heads out, but the barrels were otherwise entire;) "there were between forty and fifty repaired by the cooper, some barrels and some half-barrels. I did not notice any, that were wholly stove to pieces; — they were in bad condition, and the worst were coopered; the flour not out of some of them; — the water had mixed and made a paste of some of them." In answer to a question, whether there could have been as many barrels as eight or ten in staves, or stove to pieces, lying about or on the decks, without his seeing it, while in charge of the vessel, he answers, "No; there was no such thing to my knowledge; — I did not see them. I should certainly have seen it; if there had been any thing of the kind, I should have seen it." He says, that he was down to the vessel two or three times a day, and stayed, sometimes one hour, sometimes three or four hours, and sometimes all the forenoon. He did not see any empty barrels, except among the dunnage, after the cargo was discharged. He does not recollect,

whether there was any flour at all spilled among the corn; the barrels, whose heads were out, were nearly full of flour; he should say, they were full barrels. He adds, (what is denied by John Davis, the witness,) that there was a communication open between the cabin, and steerage, and hold, through which barrels of flour could have been taken into the cabin.

Now, upon this state of the evidence, it seems to me difficult to escape the conclusion, that Davis the witness's account of the state of the flour upon the unlivery is a gross exaggeration. It is impossible for the Court to believe, that the deficit of twenty-two barrels of flour, and twelve half-barrels, can be accounted for by any breakage of the barrels and spilling of the flour, ascertained upon the unlivery. If the loss had been of three or four barrels only, it might be accounted for in this way; at least, the Court would have presumed in favor of it, rather than for such a trifling amount have pressed home an imputation of gross negligence or fraud. The present deficit cannot be accounted for, except upon the presumption of gross negligence or embezzlement, on the part of some persons entrusted with the unlivery, or having confidential access to the property.

But the case does not stop here. In point of fact, ten barrels of flour of the Boston's cargo, were actually conveyed in the Magnolia from Boston to Hallowell, and there sold by the master of the Magnolia, as his own property. This is admitted by the master himself, and is established beyond controversy in the evidence. The sale of the Boston's cargo by the Marshal was on the sixth day of October, 1832. The Magnolia sailed from Boston for Hallowell on or about the 25th of the same month. In the manifest of her cargo, sworn to by the master at the Custom-House on his departure, there is no item of flour. But in that manifest there is

this item: "Forty-six barrels sundries, marked 'J. P. Jr.,' shipper, John Page, Jr., Hallowell." Now, whatever these barrels of sundries were, they were not flour of Page's shipment, or purchase, at Boston. There is no proof of any flour being purchased in Boston for Page, and shipped on board the Magnolia. There were thirty-four barrels of flour purchased by Capt. Davis at New York.

There is the testimony of a Hallowell witness, Nathan W. Butler, (not of the crew,) who says, that he was in Boston in the autumn of 1832, when the Boston was lying on the south side of Long-wharf, having been a few days before brought in by the Magnolia. While the Boston was lying there, he saw some barrels of flour taken from her, and rolled across the wharf, and put on board the Magnolia. How many barrels he cannot say; but Capt. Davis, of the Magnolia, told him, that he was going to bring his part of the flour, that was found on board of the Boston, to Hallowell. The corn, he said, he should not bring from Boston, but let it be sold at auction, as that was some damaged. This conversation was had, while the flour was discharging from the Boston. Now, in point of fact, Capt. Davis was not a purchaser of any of the flour of the Boston at the auction, as appears by the auctioneer's account, now before the Court, and no satisfactory explanation whatever is given of this conversation.

Capt. Davis admits the possession of ten barrels, part of the Boston's cargo, and that he carried them to Hallowell in the Magnolia, (though there is no specification of them in his manifest,) and sold them there; and he asserts, that he purchased them of a person in Boston by the name of Ricketson, whom he never saw before, from whom he took a bill and receipt, on paying him for the flour; and that he has never seen him since. He appeared to be a merchant of respectability, and very much of a gentleman. Now, on inspection

of the auctioneer's account, no person of the name of Ricketson appears as a purchaser; and it is admitted at the bar, on both sides, that, after a diligent search, no person by that name, or any other name, can be found in Boston, to whom the purchase or sale of these ten barrels can be traced.

It seems to me, that these circumstances are abundantly fruitful of well founded suspicion against the *bona fides* of the title to these ten barrels of flour. Nor does the testimony of John Davis, the witness, by any means relieve the case from the just weight of these suspicions. In support of the master's case, he states, "I was at work on Long-wharf, while the schooner Boston was discharged. I went up to Capt. Davis, who was talking with a gentleman. I was going to ask him, what I should do with the basket, with which I had been discharging the Boston's corn. I heard the gentleman say, 'You had better take fifty barrels.' Capt. Davis said, he was short of money, and had been at considerable expense; you may send me down ten barrels, as soon as you are a mind to. The gentleman asked, 'Where does your vessel lay?' he says, 'Right opposite here, on the back side of the wharf,' and turned round and pointed towards where the vessel lay." Now, without stopping to consider, whether, as mere hearsay, the objection made to this testimony is not well founded, but admitting its full force, it presents a very extraordinary state of facts. That a gentleman, unknown to all parties, should be trafficking with the master for fifty barrels of flour, without any known place or store, where he or they were to be found; that this flour, or any part of it, should be of the Boston's cargo; that the master should purchase the ten barrels, without further inquiry; and that no trace can now be found of the gentleman, or of any purchase of any of the Boston's cargo by him; these are circumstances somewhat startling, and cast an air of improbability over the asserted transaction.

When we connect it with Butler's testimony, which is left wholly unexplained and unrepelled, that improbability is certainly a good deal enhanced. The Court cannot but feel, that the master is bound to give some more satisfactory account of his purchase. Why was not this flour stated in the manifest at Boston, when all the rest of the cargo was? Even the learned Counsel, who has argued with so much zeal and ability for the master, has been compelled to admit, that this part of the case is not beyond suspicion. He says, that Ricketson may have become sub-purchaser after the sale, although it cannot be traced; or, that he may have been a thief, and have been credulously bargained with by the master. But, how should the flour have been stolen, if the master at or before the unlading had exerted the vigilance, which he has so strongly asserted? A theft after the sale cannot be pretended; for no purchaser has attempted to set up any deficit in his own purchase or delivery; and none is now relied on.

But the master admits, that he took a bill and receipt for the purchase from Ricketson. Where is that paper? The Counsel for the master are obliged to contend, that it has never been produced. We shall presently see, if this be correct. If not produced, why is it withheld? The very suppression of it is calculated to aggravate every suspicion. If produced, it might enable us to trace the verity of the transaction; for handwriting often affords a satisfactory clue. Does not its non-production, then, imply, that it will not bear scrutiny? that it will not mitigate the imputation of guilt, but deepen it?

But, in point of fact, how stands the case, as to the bill and receipt? It is proved in the case, that the Counsel for Capt. Davis produced, and delivered to the Counsel for the claimants, an original paper, purporting to be the very bill and receipt, and with no intimation of any doubt of its genuineness,

or of their not intending to use it, as evidence in the case. On the contrary, it is an irresistible inference, that it was relied upon as genuine, and if so, as most important evidence in the case. That paper, after an exact and literal copy was taken, (which is now in Court,) was re-delivered to the Counsel of the master; and has been since traced home to the hands of the master. Nay, after its existence and production had become a most material point in controversy in the case, and when the person, in whose hands it was, was about to be examined as a witness, to produce and annex it to his testimony, Capt. Davis deliberately received it from the witness, and destroyed it. No explanation has been given, or attempted, of this act; and it, therefore, stands in the case, as a deliberate suppression of a paper of singular importance in the cause; if genuine, to the interest of the master; if otherwise, of much strength of presumption of fraudulent misconduct. But it has been said, that there is no evidence, that the paper originally came from, or was accepted as genuine by, Capt. Davis. It may be far more correctly said, that there is no evidence, that he has ever repudiated it, or disavowed it. It is found in possession of his Counsel, as a document in or for the cause. How it was obtained by them is not satisfactorily shown. As far as any evidence goes, it is probably traced through and from his attorney at New York. Nay, to this very hour, Capt. Davis does not pretend, that he ever disavowed its genuineness to his Counsel, or that it did not come to them by his direction or consent. The claimants could not examine them to this point. Capt. Davis was at liberty so to do; and has not chosen to do it. Nay; looking to the evidence in the case of the existence of the paper, and its destruction by Capt. Davis, his very silence is as expressive, as the most positive declaration, that he had not treated it as a spurious document. It has been said, that it might have

been forged by persons in the adverse interest at New York, to give a complexion to the cause. Surely, the Court cannot be expected to act upon such a naked conjecture, without even the shadow of any proof in its favor, positively or negatively.

The bill and receipt must then be considered, through the instrumentality of the copy, to be clearly in the case, offered as a genuine voucher by Capt. Davis. It is in the following words:

"*Boston, November 14th*, 1832.

"Capt. Davis, ... Dr.

"To F. Ricthrson, for ten barrels Flour, partly damaged, at four dollars and three quarters per barrel, $47·50.

"Received Payment, F. RICTHSON."

Now, it seems difficult to escape the impression, that the paper itself is a spurious contrivance by some person. The supposed name of the seller is spelt in one place "Ricthrson," and in another "Richtson." The date is the 14th day of November, 1832; the sale of the Boston's cargo was more than a month before (on the 6th of October); the Magnolia cleared out from Boston for Hallowell on the 25th of October; and the master has testified, that he was in Hallowell on the 14th of November. Yet if the representations of the master or mate are to be credited, the bill and receipt were given on board of the Magnolia, while she lay in Boston.

If, under these circumstances, the Court would come to the conclusion, that Capt. Davis had established a *bonâ fide* purchase of these ten barrels of flour, it would be by an exercise of compassionate credulity beyond any to be found in judicial annals. With whatever reluctance, the Court is compelled to say, that there is a total failure to establish it.

Hitherto, the case has been considered upon the evidence

arising *aliunde* the ship's crew; and, on the part of the claimants, at least, upon evidence entirely free from the suggestion of any discredit. But the positive evidence of the three seamen of the Magnolia, (Hanson, Thorn, and Clarke,) goes directly to establish a studied embezzlement by the master, with the connivance and aid of the mate, of the rigging and other ship's furniture, charged by the claimants. If it stopped here, (although the full consideration of the bearing of this evidence properly belongs to another part of the cause,) it would go far to support the embezzlement of the flour also; for the maxim may here properly apply, under such circumstances, *Falsus in uno, falsus in omnibus*; he, who would embezzle the former, would not hesitate as to the latter. But the witnesses speak to the flour also. Hanson says, that one morning, just at break of day, — the morning when the Boston was discharged, — he saw a dray coming from Long-wharf to the T-wharf, (where the Magnolia lay,) with ten barrels of flour; they were carried opposite the Magnolia, and the mate of the Magnolia gave orders to strike them directly into the hold. He assisted in doing so. He knew they were part of the Boston's cargo, because they were wet, and corn and feathers were sticking to them. The mate said, they were part of the Boston's cargo. Thorn is still more direct and particular on the same point. Clarke is equally positive and direct.

Now, if these witnesses are to be believed, there is on this point an end of the case. The embezzlement is established beyond controversy. Some attempt has been made to discredit the testimony of these witnesses; but not, I think, with success. They are materially confirmed in some circumstances, as to the rigging, &c., by Mr. Bergen, who is a New York broker, and was employed to examine into this very matter of the embezzlement, when the Magnolia at a subse-

quent period, (in December, 1832,) was again at New York. He then went on board of the Magnolia, in company with Thorn and Hanson, and Carpenter, a seaman of the Boston, and found Clarke on board, and the mate Kateng. He says, that Carpenter there pointed out, then on board of the Magnolia, the boom-tackle and watch-tackle of the Boston; and the mate admitted the fact. Carpenter also pointed out a wood-saw, hand-pump, draw-bucket, an axe, and some rigging, belonging to her. He adds, that the mate, after some hesitation, admitted the facts; and also admitted, that some of the Boston's flour, (ten or eleven barrels,) was taken on board of the Magnolia; and endeavoured to excuse himself. Now, the mate stoutly denies the whole of this evidence; and certainly, so far as it is founded in hearsay, it cannot affect Capt. Davis; but as to the mate, it bears directly upon his own claim.

Mr. Bergen's testimony is assailed, as incredible in itself, and as contradicted by other testimony. He certainly is contradicted by Kateng, the mate, and by Theodore Blackburn, a boy then belonging to the Magnolia. The testimony of the former is already disposed of. The testimony of the latter is open to attack, as disingenuous and suppressive of proper answers to some of the interrogatories; and has been assailed on other grounds. It is wholly unnecessary to consider these objections, because my judgment is, that Bergen's testimony is credible in itself, and is amply corroborated from other sources.

Upon the whole, without going farther into this part of the case, my judgment is, that the case of embezzlement of the flour is fully made out; and it equally affects the claim of master and the mate.

As to the embezzlement of the anchor, and rigging, and other furniture of the Boston, I shall be very brief. It is admitted, that many of the articles were taken on board of the

Magnolia, and carried to Hallowell. And the defence asserted is, that it was a case of sheer mistake, and corrected as soon as discovered. This is true to some extent; and it is quite possible, that the change of the anchor of the Boston for that of the Magnolia may have been by mere mistake. But it was not returned; and as to the boom-tackle, and watch-tackle, and other articles, found at New York, on board of the Magnolia, the defence is not completely established. It is manifest, that a good deal of the appropriate equipments and furniture of the Boston disappeared after her disaster. If the testimony of the three seamen is to be believed, there is (as has been already stated) unequivocal evidence of a meditated embezzlement of many of these articles. If the other part of the transaction had been free from all doubt, there might have been some scope for an indulgent consideration of this part of the case, upon the ground of negligence, or ignorance, or mistake. As the actual posture of the case is, it seems to me, that the taint of embezzlement has infected the whole transaction to an extent fatal to the claim of salvage. I regret, that I am compelled to arrive at this painful conclusion; but, looking to all the circumstances, I am unable to escape from it.

My judgment accordingly is, that the decree of the District Court, as to the amount of the salvage, ought to be affirmed. As to the distribution of the salvage, there being no appeal, whatever might otherwise be my opinion, I do not feel at liberty to disturb it. But, I do decree, that the shares of Capt. Davis, both as part owner and as master, in the salvage, be decreed forfeit to the owners of the Boston and cargo; and also, that the share of the mate, Kateng, be in like manner decreed forfeit. In all other respects, the decree of the District Court is to be affirmed; and, under all the circumstances of the case, I shall direct the costs of all

parties, libellants and claimants, in this Court, to be a charge upon the property saved, and to be deducted therefrom accordingly. Each party here has prevailed to a certain extent, and therefore may well claim some indemnity; and the master and mate have been sufficiently punished by the forfeiture of salvage, without attempting to press upon them any separable item of the costs. I shall refer it to the clerk, to ascertain and report what sums are due to the salvors respectively, according to the principles of this decree, and the amount of the shares of the master and mate, which are decreed to be forfeited.

Decree accordingly.

For claimants and appellants, *T. Parsons* and *W. G. Stearns*; for libellants and appellees, *B. Sumner* and *I. McLellan, Jr.*

GEORGE PARKMAN *v.* JAMES BOWDOIN AND ANOTHER.

A devise to A for life, and after her death to her second son B, and to his lawful begotten children in fee simple for ever; but in case he should die without children lawfully begotten, to the other son of A, (C,) and to his lawfully begotten children in fee simple for ever. At the time of making the will, B had no children. *Held*, that B took a fee tail, with remainder to C, on an indefinite failure of issue of B.

COVENANT, for a breach of the covenants of a deed, dated the first day of March, 1833, conveying certain real estate in Boston. Among other covenants the defendants covenanted, that the said James Bowdoin (one of the grantors) was seised and possessed of the premises in fee tail, was of full age, and was duly entitled by law to give, grant, sell, and convey the same in fee simple to the plaintiff, &c. &c. The breach al-

leged was, that the said James Bowdoin was not so seised, &c. &c. The plea averred, that the said James Bowdoin was seised and possessed of the premises in fee tail, was of full age, and was duly entitled by law to give, grant, sell, and convey the premises, in fee simple, &c. &c.; on which issue was joined. At the trial the jury found a special verdict; which was afterwards argued by *Charles P. Curtis* for the plaintiff, and by *Jeremiah Mason* for the defendants.

Story J. The sole question arising under the special verdict is, whether James Bowdoin, the grantor, was at the time of the conveyance seised in fee tail of the estate in controversy. If so, then, under the Statute of Massachusetts, of the 8th of March, 1792, (Act of 1791, ch. 61,) as he was of full age, he was capable of passing a fee simple to the grantee, there being nothing to impeach the *bona fides* of the deed of conveyance.[1] The question, whether he was so seised in fee tail, turns altogether upon the true interpretation of the will of Mrs. Sarah Bowdoin, made on the 18th of July, 1812, which has been duly proved and approved by the proper Court of Probate. I pass over all consideration of her subsequent marriage with the late General Dearborn, and the trust deeds and settlements executed upon that occasion; because it is admitted, that they do not change the legal posture of the case, the will being expressly upheld by them.

The clause in the will, on which the case turns, is in the following words: "*Eighthly.* I give and devise to my beloved, affectionate, worthy niece, Mrs. Sarah Bowdoin Sullivan, wife of George Sullivan, Esq., of said Boston, for and during the term of her natural life, all my real estate in Milk Street, in said Boston, with the house, stables, coach-house, and all the other buildings, and all the land thereunto belong-

[1] See *Lithgow* v. *Kavenagh*, 9 Mass. R. 161.

ing, which I at present possess, agreeable to the last will of my late worthy husband; and at her death I give the said estate to her second son, James Bowdoin Sullivan, he dropping the name of Sullivan, and taking and retaining the name of Bowdoin, and to his lawful begotten children in fee simple for ever. But in case he should die without children lawfully begotten, I hereby give the estate to the oldest son of the said Sarah B. Sullivan, now named George Richard Sullivan, on condition of his dropping the name of Sullivan, and taking and retaining the name of George Richard James Bowdoin, and to his lawful begotten children in fee simple for ever. But in case of the death of the above named James Bowdoin Sullivan and George Richard Sullivan, without lawful begotten children, the said estate shall be a younger son's of the said Sarah Bowdoin Sullivan, on condition of his taking and retaining the name of James Bowdoin, and to his lawful begotten children in fee simple for ever. And in case of the failure of all such sons of the said Sarah Bowdoin Sullivan, and they dying without lawful begotten children, it shall be her oldest daughter's, or in case of the death of her oldest daughter without children, it shall be her second daughter's, and so on to her youngest, and to her children in fee simple for ever."

Now, the special verdict finds, that Mrs. Sarah Bowdoin, the testatrix, died in 1826, seised of the premises for her natural life; that the devisees, James Bowdoin Sullivan and George Richard Sullivan, (the grantors of the plaintiff,) have changed their names in conformity to the will; that they came of full age, namely, the said George on the 14th of November, 1830, and the said James on the 16th of March, 1832; and that Mrs. Sarah Bowdoin Sullivan, the devisee, and her husband, George Sullivan, on the 29th of December, 1832, duly conveyed her life estate in the premises to their

son, the devisee, James Bowdoin. The effect of these facts is, that by the union of the life estate with the remainder under the will, if that remainder gave a fee tail, the devisee, James, was at the time of the conveyance to the plaintiff, tenant in tail in possession; for it is found, that he had a seisin and possession of the premises according to his title. It may be well to add, what is apparent upon the face of the special verdict, that James and George, the devisees, at the time of the making of the will, were without issue, being then of very tender years.

The devise, then, stripped of unnecessary appendages, is a devise in remainder to James, (the grantor,) and to his lawfully begotten children in fee simple for ever. But in case he should die without children lawfully begotten, then to George, (the grantor,) and his lawfully begotten children in fee simple for ever. And in case of the death of both, without lawfully begotten children, then to a younger son of Mrs. Sarah B. Sullivan, and his lawfully begotten children in fee simple for ever; and in case of the failure of all sons, then to the daughters successively, &c. &c.

The argument for the plaintiff is, that, taking all the clauses together, the intent of the testatrix was, that the devisee, James, should take a remainder in fee simple, with an executory devise over to the devisee, George, in fee simple, in the event of the failure of issue of James. But the argument is surrounded with this difficulty, that, if it can be maintained, it may defeat the very intention, which it is supposed to support. If the executory devise over is to be on an indefinite failure of the issue, then it is too remote, and therefore void. If it is to be limited to a failure in the life-time of James, then if James should leave issue, who should die without issue, the remainder over to George would wholly fail; for the event would not have occurred, upon which it was to go

over.[1] It is plain, then, that if the testatrix intended, as I think she did intend, to create successive estates in the children of Mrs. Sarah B. Sullivan upon the total failure of the line in the elder branches, the construction contended for would or might, upon either supposition, defeat it. And I am of opinion, that this construction would directly defeat it; for upon principle, as well as authority, the words, "if he should die without children," ought to be construed an indefinite failure of issue, for want of suitable words limiting the failure to any other period; and, as I shall presently show, issue and children are in this devise precise equivalents. So that the executory devise over would be utterly void for remoteness.

On the other hand, if we construe the estate in James to be an estate tail, and, in default of his issue, successive estates tail in the other children, according to priority of birth and sex, the manifest object of the testatrix in keeping the estate in the family, so long as there are any descendants, may, by the rules of law, be accomplished. Why, then, should we not give this construction to the terms of the will? Certainly we ought so to do, if there be nothing repugnant to the just sense of the terms used, and it will further the intention of the testatrix; for in all cases of wills, the intention is to govern, if not inconsistent with the rules of law.

Let us, then, examine the terms of the devise. It is to James and to his lawfully begotten children in fee simple for ever. Now, it is plain, that as James had no children at the time, they could not take immediately by way of *descriptio personarum*, as joint tenants with their father, a fee simple; and therefore we are driven to construe the word "children"

[1] See *Bayley* J., *Tenny* v. *Agar*, 12 East R. 253, 261. *Doe* v. *Webber*, 1 B. & Ald. R. 713, 720.

as words of limitation, and not as words of purchase. And this is in conformity to the rule laid down in *Wild's case*, (6 Co. R. 17,) which has been constantly recognised as law down to our day.[1] "And this difference" (says Lord *Coke*) "was resolved for good law, that if A devises his lands to B and his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the testator is manifest and certain, that his children or issues should take; and as immediate devisees they cannot take, because they are not *in rerum naturâ*; and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; therefore these such words shall be taken as words of limitation, *scilicet*, as much as children or issues of his body." The only distinction between the case thus put, and that now at bar, is, that here the estate to James and his children is in remainder, after a life estate to his mother. But that makes no difference in law, because it is still an immediate estate to the children in the remainder, as much as to their father, James, and not a remainder subsequent to his estate in the premises. So that the reasoning in *Wild's case* is strictly applicable, as will appear upon the next resolution in the same case: "But it was resolved, that if a man, as in the case at bar, devises land to husband and wife, and *after their decease* to their children, or the remainder to their children; in this case, although they have not any child at the time, yet any child, which they shall have after, may take by way

[1] *Wild's case* is always referred to with approbation. See *Buffar* v. *Bradford*, 2 Atk. R. 220. *White* v. *White*, Willes R. 348. *Wharton* v. *Gresham*, 2 W. Bla. R. 1083. *Cook* v. *Cook*, 2 Vern. R. 545. *Oates* v. *Jackson*, 7 Mod. R. 439. *King* v. *Melling*, 1 Ventr. R. 231. *Hughes* v. *Sayer*, 1 P. Will. R. 534. *Davie* v. *Stevens*, Doug. R. 321. *Hodges* v. *Middleton*, Ib. 430. *Seale* v. *Barter*, 2 Bos. & Pull. R. 485. *Broadhurst* v. *Morris*, 2 B. & Adolp. R. 1.

of remainder, according to the rule of law; for his intent appears, that their children should not take immediately, but after the decease of R and his wife."[1]

Indeed, *Wild's case* itself presented the very point, if there had been any distinction between the case of a devise of an immediate estate in possession and such a case in remainder; for, there, the question arose upon a devise in remainder, after an estate to the testator's wife for life. And this last resolution puts the case expressly on the ground, that the children were to take *after the decease* of their parents, and not immediately with them.[2] And according to the opinion of Lord *Alvanley*, in *Seale* v. *Barter*, (2 Bos. & Pull. R. 493,) who cites also the Report in Moore, 397, all the Judges thought, that if there were no children *in esse* at the date of the will, it would have been an estate tail. Lord Chief Justice *Willes*, in delivering the judgment of the Court in *Ginger* v. *White*, (Willes R. 348, 353,) pointedly affirms the same doctrine.[3]

Now, it cannot be pretended, that James's children were, under the present devise, to take the estate solely in remainder after his decease, which could only be by a devise to him for life, and to the children after his decease in fee; whereas the devise is to him and his children in fee simple. And if the word "children" is to be construed as words of purchase, and not of limitation, he must take a fee simple jointly with them. And this is doubtless the ground, upon which *Oates* v. *Jackson* (2 Str. R. 1172) was decided. There, the devise was to my wife A for her life, and after her death to her daughter, and her children on her body be-

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[1] *Wild's case*, 6 Co. R. 17.

[2] See *S. C.*, Moore R. 397. *Searle* v. *Barter*, 2 Bos. & Pull. R. 492, 493.

[3] See also *King* v. *Melling*, 1 Vent. R. 229, 231.

gotten or to be begotten by N her husband, and their heirs for ever. At the time of making the will J had one daughter, and afterwards had two sons and one daughter, who died without issue; and J survived her oldest daughter, who left issue. It was held, that J took a fee, as joint tenant, she having a child at the making of the will; and, as she survived all her children, the whole fee vested in her. And the Court relied upon the doctrine stated in Co. Litt. 9: "B having eleven sons and daughters, A giveth lands to B *et liberis suis et a lour heires*, and father and all his children do take a fee simple jointly by force of the words, 'their heirs.' But if he had no child at the time of the feoffment, the child born afterwards shall not take." That the Court rely for their decision upon the fact of J having a child at the time, is very clear from the more full and accurate report of the same case in 7 Mod. R. 439, (Leach's edition.)

The case of *Annable* v. *Patch*, (3 Pick. R. 360,) turned substantially upon the same considerations; for in that case there were several children born at the time of making the will. In neither case, either in the argument or the decision, was an allusion made to any supposed distinction between an immediate estate in possession and such an estate in remainder. The case of *Buffar* v. *Bradford*, (2 Atk. R. 220,) was a case of personal estate, and turned upon that consideration; for if the parent in that case was held to take an estate tail, under a bequest to herself and the children born of her body, the parent would take the whole to the exclusion of the children. And as the intent seemed clear, that the children should take, though there were no children born at the time of making the will, the Court construed the words to be words of purchase, and not words of limitation. In a devise of real estate, there is no such necessity to construe the words as words of purchase; for the children may take under the estate tail. It is well

known, that there are great distinctions, in all this class of cases, between bequests of personalty and devises of real estate. This very case states it; and it is recognised in *Cook* v. *Cook* (2 Vern. R. 545,) *Forth* v. *Chapman* (1 D. W. R. 663,) *Dingley* v. *Dingley* (5 Mass. R. 535, 537,) and in many other cases.[1]

But there is no necessity, in the present case, of relying upon the doctrine in the foregoing cases; because, here, there is a devise over, (which did not exist in any of them,) which has always been held to have a most material bearing upon the construction of the antecedent clause, in making the words thereof words of limitation, and not of purchase. The devise is, "in case he (James) should die without children lawfully begotten," then the estate is to go over to George, and his children in fee simple. Now, this is utterly inconsistent with the notion of a fee in the children of James. For, suppose James should have children, and they should all die in his life-time, leaving issue, the estate would then, if construed to depend upon the contingency of leaving children at his death, pass over to George, thus entirely defeating the prior estate to the children of James, although they left issue. Yet no one can reasonably doubt, that the testatrix intended the devise over to take effect only upon an extinction of the issue of James; for she has added the words, "in fee simple," after children.

To give any just effect, then, to the original devise, as well as to the devise over, the word "children" must be construed, as meaning issue or heirs of the body. And, although in its primary sense, the word "children" is a *descriptio personarum*, who are to take, there is not the slightest difficulty in giving

[1] See also *Doe* v. *Perryn*, 3 T. R. 484, 494. *Crooke* v. *De Vandes*, 9 Ver. R. 197. *Hawley* v. *Northampton*, 8 Mass. R. 1, 38, 39.

it the other sense, when the structure of the devise requires it. There are many authorities to this effect in cases analogous to the present. In *Hughes* v. *Sayer*, (1 P. Will. R. 534,) the Master of the Rolls said, that the word "children," when unborn, had been in case of a will construed to be synonymous with "issue," and therefore would in a will create an estate tail. In *Davie* v. *Stevens*, (Doug. R. 321,) the devise was of the fee simple and inheritance to W. S., to him and his child or children for ever; and if he happened to die before twenty-one years of age, then devise over. Lord *Mansfield* in delivering the opinion of the Court said: "The words, *child* or *children*, are to the full as restrictive, as if the testator had said, 'and if my son die without heirs of his body.' To give the father a fee, would be to strike these words out of the will. They must operate to give an estate tail, for there were no children, born at the time, to take an immediate estate by purchase. The meaning is the same, as if the expression had been, 'to A and his heirs,' that is to say, his children or his issue." *Ginger* v. *White* (Willes R. 348,) *Hodges* v. *Middleton* (Doug. R. 431,) and *Doe* v. *Perryn* (3 T. R. 484,) point in the same direction. In this last case, Mr. Justice *Buller* said, *children* and *issue*, in their natural sense, have the same meaning. In *Wood* v. *Baron*, (1 East R. 259,) the devise was to the testator's wife for life, and after her death to her daughter A, as a place of inheritance to her and her children or her issue for ever. And if she should die, *leaving* no child or children, then devise over. At the time of making the will the daughter had a child. The Court nevertheless held, that the daughter took an estate tail; and Lord *Kenyon* said, that if the words were construed to give the daughter a fee simple, the devise over, as an executory devise, would be too remote, being after an indefinite failure of issue. In *Seale* v. *Barter*, (2 Bos. & Pull. R.

484,) the devise was to the testator's son A, and his children lawfully begotten; and for default of said issue to his daughter B, and her children lawfully to be begotten; and for default of such issue, to his son and daughter equally between them. At the time of this will, the son had no child, and his daughter was unmarried. The Court held, that the son took an estate tail; and the reasoning of Lord *Alvanley*, in giving the opinion of the Court, is very cogent in its application to the present case. In *Broadhurst* v. *Morris*, (2 Barn. & Adolp. R. 1,) the devise was to his daughter A for life; and at her decease to her husband for life; and at his decease, to his grandson W and his children lawfully begotten for ever; but in default of such issue, at his decease to his grandson A, his heirs and assigns for ever. The Court held, that W took an estate tail. This case is nearly identical with the present in its leading features.

There is a very late case, which is stronger than the present. It was a devise to trustees of all the testator's real estate, to permit his daughter to take the rents and profits, or to sell, &c., if occasion required; also to settle on any husband she might take, for life, should he survive her. But should she have a child, to the use of such child from and after his daughter's decease. Should none of these cases happen, after his daughter's decease devise over. It was held, that the daughter took an estate tail, the daughter having no child at the making of the will and the testator's death. And *Byfield's case*, cited in 1 Vent. R. 231, was relied on, where "son" was held to be *nomen collectivum*, as "child" was here.[1]

It is plain, then, that upon authority there is no difficulty

[1] *Doe* v. *Davies*, Michaelmas Term, K. B. 1832; 4 Barn. & Adolph. R. 43; *S. C.* Law Journal, 1832, p. 241. See also *Sonday's case*, 9 Co. R. 127.

in the present case, in construing the word "children" to be a word of limitation, and not of purchase, if the sense of the devise requires it. And in reason it must be so also; for the intention of the party, when discovered, must in a will control any technical sense of particular words; since the intention, if legal, is universally admitted to govern.

The strong ground, upon which the word "children" has been construed to be a word of limitation, when there is a devise over on failure of children, is, that otherwise, if there should be children born, who should die during the life-time of the parent, leaving issue, the latter would not take. This consideration has been always held decisive; and it strictly applies to the present case. *Wyld* v. *Lewis* (1 Atk. R. 432,) *Doe* v. *Perryn* (3 T. R. 484,) *King* v. *Burchall* (4 T. R. 296, *n*,) *Tenny* v. *Agar* (12 East R. 253, 261,) and *Doe* v. *Webber* (1 Barn. & Ald. R. 713, 720,) are in point.[1]

The superadded words, "in fee simple," in the original devise, so far from impugning, absolutely require this construction. They demonstrate, that the devise over is not to take effect, while there are any issue of James *in esse*. "In fee simple" means the same, as to their heirs and assigns; and the devise over, being to a collateral heir, these words are necessarily cut down to heirs of the body, if the devise over is to take effect only upon an indefinite failure of issue; and that it is so, is established by all the authorities. The universal rule is, that a failure of children, issue, or heirs of the body, means an indefinite failure of issue, unless there are other qualifying words, limiting the contingency to the death of the parent, which there certainly are not here.[2] The will, therefore, read according to the real meaning of

[1] See also *Hawley* v. *Northampton*, 8 Mass. R. 1, 41.

[2] See *Dunn* v. *Shenton*, Cowp. R. 410. *Ide* v. *Ide*, 5 Mass. R. 500. *Lillibridge* v. *Adie*, 1 Mason R. 224.

the terms, is, to James and the heirs of his body lawfully begotten, and their heirs for ever; and if he should die without such heirs of his body, then devise over. This is precisely the devise in *Dunn* v. *Shenton*, (Cowper R. 410,) where the devise was held a fee tail, with a remainder to the second devisee.

Under this aspect of the case, there is this additional reason for construing the devise to James a fee tail, that otherwise a devise over, (as has been already said,) being upon an indefinite failure of issue, would be utterly void for remoteness. Indeed, the argument at the bar surrenders the case, if the contingency is not to be limited to the decease of James. Not a single case has been cited at the bar, in which under similar circumstances a devise has been held to be upon such a limited contingency. *Richardson* v. *Noyes* (2 Mass. R. 56) is distinguishable, (if indeed that case can be supported as law,) for there were words giving the estate to the survivor, &c., which were thought to indicate, that the devise over was to take effect at the death of A, without any children then living. In *Doe* v. *Webber*, (1 Barn. & Ald. R. 713,) the devise was to the testatrix's niece A, her heirs, executors, administrators, and assigns for ever; which would clearly pass a fee simple to her. And the devise over was, in case A shall die, and leave no child or children, then to her niece B, to her and her heirs for ever, paying £1000 unto the executor of her niece A, or to such person as she by her last will shall direct. The Court held, that the devise over did not cut down the fee to a fee tail; but upon the whole language, the words, *child* or *children*, were to be construed issue; and it was an executory devise over, upon A's dying without leaving any issue at her death. The Court laid great stress on the legacy of £1000 being paid in a proximate and not in a remote event. In that case, also, there were no such words, as "children," interposed in the first devise,

as there are in the present. *Porter* v. *Bradley* (3 T. R. 143) turned upon the peculiar force of the words, "leaving no issue *behind him.*"

So that in the present case there is an evident necessity of construing the words "children," &c., to mean issue or heirs of the body. If so, they are words of limitation, and not of purchase; and the estate of James is a fee tail, and not a fee simple. For this construction several reasons may be given. First, because the children were not *in esse* at the time of making the will; and therefore they could not take an immediate estate. Secondly, because otherwise, if children were born, and died in the life-time of James, leaving issue, they would be excluded; whereas the words, "fee simple," show, that an interest was intended to the issue. Thirdly, because if "children" in the devise were to be construed to mean, not the whole class of issue, but strictly children of James, *descriptione personarum*, living at his death, then the devise over would be defeated, if James should die leaving children, who should afterwards die without issue, which plainly could not have been intended. Fourthly, because if the devise over be, as in my judgment it is, upon an indefinite failure of issue, then, as an executory devise, it is too remote and void; but as a remainder after a fee tail, it is good. And I would add, that it is a clear rule of law, that every limitation is to be construed to take effect by way of remainder, if it may, and not by way of executory devise, unless it be unavoidable to carry the intention into effect. My judgment is, that the words and the intent of the testatrix manifestly require the estate in James to be construed a fee tail, with a remainder to George. It is a case as free from doubt, on this point, as the will of an unskilful person well could be.

The consequence is, that upon the special verdict judgment must pass for the defendants.

THOMAS CLOUTMAN, APPELLANT,

v.

GEORGE R. TUNISON, APPELLEE.

Desertion during the voyage is by the Maritime Law a forfeiture of all wages antecedently due. But a desertion, to work this effect, must be, not merely an absence without leave, or in disobedience of orders, but *animo non revertendi*, an intention to abandon the ship and the service.

If after desertion a seaman offer to return to duty in a reasonable time, and offer amends, and repent of the offence, the master is bound to receive him back, as a case fit for condonation, unless his previous misconduct would justify a discharge.

By the Act of 1790, ch. 56, [29,] a statute desertion and forfeiture of wages are created by forty-eight hours' absence without leave, if a proper entry be made, on the day of the absence, in the log-book.

The effect of this provision is, that the absence for such a period is deemed conclusive evidence of desertion; whereas in the Maritime Law it would only afford a presumption of desertion.

The due entry in the log-book is indispensable to inflict the statute forfeiture. If not made on the very day of the absence, there can be no forfeiture inflicted.

Desertion, to bring after it the forfeiture of wages, either by the Maritime Law or by the Statute, must be *during* the voyage, and before it is ended.

The voyage is ended, when the ship has arrived at her proper port of destination, and is moored in safety in the accustomed place, although her cargo is not unlivered.

Officers and seamen are bound to remain by the ship, and unliver the cargo. If they do not, they are liable for damages and a compensation to the owner.

A forfeiture of two months' pay, deducted for absence of a second mate without leave, during unlivery of the ship, under the circumstances.

LIBEL for wages, as second mate of the ship America, *in personam*, against the master of the ship. The District Court decreed in favor of the libellant; and upon the appeal the cause was now argued by *Peabody* for the appellant, and by *David A. Simmons* for the libellant.

STORY J. This is a suit by libel against the appellant *in personam*, for wages asserted to be due to the libellant, as second mate of the ship America, belonging to the port of Boston. The voyage, as described in the shipping articles, is "from the port of Boston for Cuba; from thence to one or

more ports in Europe; and back to her port of discharge in the United States." The voyage was duly performed, and the ship safely arrived on her return at Boston, and there duly discharged her cargo; and there is no question, that the libellant performed his duty on board, until after the arrival of the ship. The defence set up by the answer to the libel is, that the ship arrived at Boston on Friday, the 4th of January, 1833; that after her arrival, to wit, on Monday the 7th of January, the libellant, not having been discharged, "left the ship without any license or permission from the respondent, and without any license or permission from any other person to his knowledge; and that he (the respondent) is informed and believes, that the libellant did not return, or offer to return on board, till Saturday the 12th of January; and by so deserting the ship and his duty, this respondent suggests, that the libellant has forfeited his claim for wages." The answer farther alleges, that the respondent, with the consent of the owner, on Friday the 4th of January, left the ship, and went to Salem on a visit to his family, whence he returned on Monday following; and on going on board, he saw the libellant there; that the respondent immediately went into the cabin, where he had occasion to visit his trunk, which he found broken open; and that certain articles (naming them), of the value of $34, had been taken therefrom; and on his return on deck the libellant had left the ship without his consent; and he has never since seen him on board of the ship.

As to this latter allegation of embezzlement from the trunk of the respondent during his absence from the ship, I do not perceive, in the actual form, in which it is propounded, that it has the slighest bearing upon the merits of the case. It does not set up, that the embezzlement was either by the libellant, or by his connivance; or that it was occasioned by his gross negligence or failure in duty. And certainly with-

out one of these ingredients, it is utterly impossible to maintain it, as an articulation of any matter of defence, or of set-off against the claim of wages. If it had been intended to present it to the Court in either aspect, the answer should have been framed with suitable certainty and directness for this purpose; for in Admiralty proceedings the cause must be heard upon the proofs, as applied to the allegations, *secundum allegata et probata.* No proofs are admissible of any facts not propounded in the allegations; and the decree must stand upon both. Whatever is not alleged is *coram non judice.* I dismiss, therefore, all consideration of this charge, as incapable of having any bearing upon the controversy before the Court.

The other part of the defence requires a more full and exact consideration. By the general maritime law, desertion from the ship in the course of the voyage is held to be a forfeiture of the antecedent wages earned by the party; and this rule is equally as applicable to the officers, as it is to the seamen of the ship. It is believed, that this rule constitutes a part of the maritime code of every commercial nation, and is founded upon a universal principle of public policy. But, still, a very important question remains, upon which much loose and unsatisfactory opinion seems to pervade the community. It is, What in the sense of the Maritime Law constitutes desertion? It is commonly enough supposed, that an absence from the ship without leave of the proper officer, or in disobedience of his orders, constitutes desertion. But this is certainly a mistake. Desertion, in the sense of the Maritime Law, is a quitting of the ship and her service, not only without leave, and against the duty of the party, but with an intent not again to return to the ship's duty. There must be the act of quitting the ship, *animo derelinquendi,* or *animo non revertendi.* If a seaman quits the ship without leave, or

in disobedience of orders, but with an intent to return to duty, however blamable his conduct may be, (and it is certainly punishable by the Maritime Law, not only by personal chastisement, but by damages by way of diminished compensation,[1]) it is not the offence of desertion, to which the Maritime Law attaches the extraordinary penalty of forfeiture of all antecedent wages. And even in a case of clear desertion, if the party repents of his offence, and seeks to return to duty, and is ready to make suitable apologies, and to repair the injury sustained by his misconduct, he is entitled to be received on board again, if he tenders his services in a reasonable time, and before another person has been engaged in his stead, and his prior conduct has not been so flagrantly wrong, that it would justify his discharge. Upon this subject it is well known, that the Maritime Law encourages a reasonable indulgence to human infirmity, and especially to the known thoughtlessness and rashness of seamen. It favors repentance and condonation; and will not permit a master to insist upon the utmost stretch of authority, or forfeiture, unless there is a clear propriety in exerting it. My learned friend, Mr. Chancellor *Kent*, has, in his Commentaries, (3 vol. Lect. 46, p. 198, 2d edition,) put this doctrine on its right footing, and persuasively shown its justice and sound policy.

But there must not only be a desertion, but the desertion must be in the course of the voyage, and before its termination in the home port, to justify an infliction of the forfeiture by the Maritime Law. It is not sufficient, that there has been a desertion after the voyage has ended; although it be within the period, for which the party is bound to do duty on board the ship. It must be *during the voyage*. Now, when is the

[1] See 1 Valin Comm., Lib. II, tit. 7, art. 3, p. 534. *The Ship Mentor*, 4 Mason R. 84. 3 Kent Comm., Lect. 46, pp. 198, 199, (2d edition.)

voyage ended, in the sense of the Maritime Law? I answer, when the ship has arrived at her last port of destination, and is moored in good safety in the proper and accustomed place. I do not say, that the officers or seamen are then discharged from any farther duty, and are not bound to attend to the unlivery of the cargo. On the contrary, I maintain, that the seamen, and *à fortiori* the officers are bound to remain by the ship, and watch over her concerns, and assist in the unlivery of the cargo, if made in a seasonable time; unless there be some express or implied agreement, or established usage, to dispense with their farther services. There is a clause in the common ship articles, pointed to this very duty. "And whereas" (says the clause) "it is customary for the officers and seamen, on the vessel's return home, in the harbour, and whilst her cargo is delivering, to go on shore each night to sleep, greatly to the prejudice of such vessel and freighters, be it further agreed by the said parties, that neither officer or seaman shall, on any pretence whatever, be entitled to such indulgence; but shall do their duty by day in discharging the cargo, and keep such watch by night as the master shall think proper to order for the preservation of the same." And this very stipulation is in the present articles, and constitutes a part of the contract. But it is one thing to be responsible for a violation of the terms of the contract; and quite another thing to incur the visitation of the maritime penalty of forfeiture of the whole wages of the voyage. In the present case, it is, in my judgment, quite clear that the voyage was ended, so far as the Maritime Law is concerned, at the time when the asserted act of desertion took place. The vessel was not only safely moored, but had come to the wharf, and had been duly entered, and part of her cargo had been discharged. However reprehensible the act, then, was, it was not a desertion during the voyage; and

therefore, so far as the forfeiture turns upon the principles of the Maritime Law, it was not incurred. Nor is there any thing novel in this doctrine. It is manifestly implied in the reasoning of that truly great Judge *(Princeps inter pares)* Lord *Stowell*, in the case of *The Pearl*, (5 Rob. R. 224,) which has been cited at the bar. But it is still more directly announced in the more recent case of *The Baltic Merchant*, (Edwards' R. 86.) In this latter case, which turned upon the very point, whether the voyage was ended by a mere arrival in port, Lord *Stowell* on that occasion said: "By interpretation of law, the voyage is not completed by the mere act of arrival. The act of mooring is an act to be done by the crew; *and their duty extends to the time of the unlivery of the cargo*. There is no period at which the cargo is more exposed to hazard, than when it is in the act of being transferred from the ship to the shore; and therefore the law, not only the old law, but particularly the Statute, by which the West India trade has been in later times regulated," (and the case before him was of a West India ship,) "has enjoined in the strictest manner, that the mariners shall stay by the vessel, until the cargo is actually delivered. I take this to have been always a part of the duty of the mariners; their contract is legally understood to go this length; and there never can have been a time, when the owner was not entitled to some consideration against the mariners, on account of the non-completion of the contract. This is a consideration not *in modum pœnæ*, but it is a civil compensation for injury received, existing in all reason and justice antecedently to any Statute upon the subject." His Lordship here points out the very distinction between cases of compensation for an imperfect performance of the contract, and cases of forfeiture for desertion, which are strictly *in pœnam*. And he afterwards proceeded to decide, that the voyage in that case could

not, upon the true construction of the Statutes on the subject of the West India trade, be deemed to be ended, (not, until the cargo was unlivered, but) until the vessel was safely moored in the West India docks; and when so moored, he held the voyage complete and ended, so that the forfeiture for desertion would not afterwards attach. But, the desertion being before such mooring, he pronounced for a forfeiture in the case. It seems to me, that this decision is as fully in point as could be desired; and it affirms, what has always appeared to me to be the true import of the Maritime Law.[1] I am therefore of opinion, that, upon the mere footing of the Maritime Law, no forfeiture of wages has been incurred; because, in the first place, I am not satisfied, that there was any quitting the ship *animo non revertendi*, with an intention to desert the service; and, in the next place, because, at the time of the asserted absence, the voyage was ended.

The next question is, whether there has been any statute forfeiture of the wages for the asserted desertion. The fifth section of the Act regulating seamen in the merchants' service, (Act of 1790, ch. 56, [29],) provides, "That if any seaman, &c., shall absent himself from the ship or vessel in which he shall have shipped, without leave of the master or officer commanding on board, and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman, &c., *on the day he shall so absent himself;* and if such seaman, &c., shall return to his duty within forty-eight hours, such seaman, &c., shall forfeit three days' pay for every day for which he shall so absent himself, to be deducted out of his wages. But if any seaman, &c. shall absent himself for more than forty-eight hours, at any one time,

[1] See Abbott on Shipping, Pt. 4, ch. 3, § 3, pp. 463 – 472, and Story's Notes, edition of 1829. *Frontine* v. *Frost*, 3 Bos. & Pull. R. 302.

he shall forfeit all the wages due to him, and all his goods and chattels, which were on board the ship, &c. &c., at the time of his desertion, to the use of the owners of such ship or vessel; and moreover shall be liable to pay to him or them all damages, which he or they may sustain by being obliged to hire other seamen or mariners in his or their place," &c. &c. This section has always been construed to apply to cases of unlawful absence during the voyage, after the vessel has left the home port, at which it commenced; as the second section of the same Act has been also held exclusively to apply to such absence at the home port.[1] It supposes, therefore, that the voyage is still in transit; and can by no reasonable interpretation extend to any absence after the voyage is ended. Independent of this general ground, which at once, from what has been already stated, disposes of this part of the defence, there is another quite as decisive. The Statute manifestly contemplates a distinction between absence without leave and desertion; and it supposes, that the former, if there should be a return to duty within forty-eight hours, would not incur the forfeiture of all antecedent wages by the Maritime Law; for it would be almost absurd, if such were the legal result, to declare the minor penalty of a forfeiture of three days' pay. It treats absence, therefore, without leave, to be an equivocal act, and not necessarily desertion, *animo non revertendi*. But, inasmuch as such prolonged absence might endanger the safety of the ship, or the due progress of the voyage, it deems forty-eight hours' absence without leave, to be *ipso facto* a desertion, and inflicts upon it a total forfeiture of wages. It thus creates a Statute desertion, and makes that conclusive evidence of the fact, which would, upon the common principles of the Maritime Law, be merely presumptive

[1] See *Cotel* v. *Hilliard*, 4 Mass. R. 664.

evidence of it. It does not supersede the general doctrine of the Maritime Law, or repeal it; but merely in a given case applies a particular rule *in pœnam*, leaving the Maritime Law in all other cases in full efficiency. But, to bring the case within the Statute, there must be a strict compliance with all the Statute requisites; for, in a case so highly penal, nothing is to be taken by intendment. Now, to work the statute forfeiture, it is made an indispensable condition, that the mate, or other officer having charge of the log-book, should make an entry therein of the name of such seaman, *on the day on which he shall so absent himself*; and the entry must not merely state his absence, but that he is absent *without leave*.[1] The entry on the very day is, therefore, a *sine quâ non*. It is a just and reasonable precaution, to prevent all subsequent fraudulent entries, and all parol evidence of unlawful absences in the progress of the voyage, which may result from after thoughts and contrivances, from personal pique, or from the unavoidable deficiency of positive proof of leave. Whoever is much acquainted with maritime life, has had occasion to know, how many cases of this sort would arise from the common controversies between seamen and officers, if such solemn charges could be set up at any distance of time, without any other proof, than the quickening power of resentment, or the stimulated industry of memory, might supply by parol. Now, the proof is incontestable, and indeed it is admitted, that the entry of absence without leave in the log-book, was not made until the evening of the fourth day after the asserted absence without leave; and it was then made at the special application of the owner himself. Under such circumstances it is manifest, that it is not a compliance

[1] Abbott on Shipping, Pt. 4, ch. 3, § 3, p. 468, Story's Note, edition of 1829.

with the Statute; and therefore the defence on this point cannot be sustained. Indeed, if the Statute were out of the question, I should have thought, that the entry in the log-book, being after the case was put in controversy, *post litem motam*, would have been inadmissible upon general principles to found a penalty.

Whether the omission to record the entry of desertion in the log-book would have been equally fatal to an enforcement of the forfeiture of the Maritime Law for desertion, it is not necessary to decide. The present inclination of my opinion is, that it would not be. But, be this as it may, the omission would afford a strong presumption, that there was an express or implied leave of absence, unless the other circumstances of the case positively repudiated it.

But, although I cannot pronounce for a forfeiture of wages in this case founded upon any desertion, statutable or maritime; yet I am entirely satisfied, that the absence in this case was without leave, either of the master or owners, and indeed was against the known will, if not the orders, of both. It is, therefore, a case of a criminal disobedience and departure from duty; and the more reprehensible, because it was done by an officer of the ship, who ought to know better, and owes a better example both to the seamen and to his employers. I cannot but feel also, that the evidence establishes, that the absence was the less excusable, because it was under some feelings of resentment for censures passed upon his inattention by the owner; and because it is, in an emphatic manner, the duty of the second mate to attend punctiliously to the discharge of the cargo, to prevent plunderage and damage, and to secure promptitude and care on the part of the persons employed in the unlivery. The excuses set up by him are in a legal point of view wholly unsatisfactory, and are matters of personal feeling, with which the Court cannot intermeddle.

I follow out the doctrine on this subject in the case of *The Baltic Merchant*, (Edwards' R. 86,) and deem the owner entitled, not merely to a compensation for the loss of the services of the second mate during this period, but for something more, as a just admonition to officers having such high and responsible duties devolved upon them, and designedly departing from them. Of moral turpitude or blame I acquit the libellant, but not of studied omission of duty. The District Judge came upon this subject to the same conclusion, which I have arrived at. He inflicted the penalty of a forfeiture of one month's pay for the neglect. If this were the case of a common seaman, I should do the same. But in the case of an officer, I think the good of the merchants' service requires a somewhat higher forfeiture. If the effect of this would be to deprive the libellant of his costs in this Court, I would not upon so slight a difference of opinion change the decree. But, as under no circumstances I should allow the libellant's costs in this Court, thinking, as I do, that the appeal was rightly and properly taken, I shall decree a forfeiture of two months' pay, instead of one month's pay, of the mate to be deducted (namely $36), and affirm the decree as to the residue. Each party is to bear his own costs in this Court; and the libellant is to be entitled to his costs in the District Court.

Decree accordingly.

ICHABOD MACOMBER AND OTHERS, APPELLANTS AND RESPONDENTS,

v.

JOHN M. THOMPSON, APPELLEE AND LIBELLANT.

In a suit for wages, or for a share in a whaling voyage, if the defence sets up misconduct, there must be a special allegation of the facts, with due certainty of time, place, and other circumstances; otherwise the Court will reject it. Loose allegations of general misconduct are insufficient.

Damages can be recovered for the misconduct of a seaman, only when they are the direct and immediate result of his acts or omissions, not when they are remote and contingent; *Causa proxima non remota spectatur.*

Under the circumstances, one hundred dollars deducted from the share of the libellant in a whaling voyage, for gross misconduct.

LIBEL for the share of the libellant, as cooper on a whaling voyage to the Pacific Ocean and back to the United States. The answer admitted the service and share of the party; but asserted gross misbehaviour, as incurring a forfeiture. The decree of the District Court was in favor of the libellant, from which an appeal was taken.

The cause was argued by *E.* and *F. Bassett* for the libellant, and by *Simmons* and *Fletcher* for the respondents.

STORY J. This is a libel for the share of the libellant, as cooper of the ship Maine, of the proceeds of a whaling voyage to the Pacific Ocean and back to the United States, brought against the respondents, as owners of the ship. There is no controversy, that the service has been duly performed by the libellant for the voyage, and that he is entitled to the proceeds of his share of the earnings of the voyage, unless the matters of defence, set up in the answer, constitute a legal bar to the claim. The answer, in the first place, asserts, that the libellant "did not, and would not, though often thereto requested and ordered by the master and other lawful officers of the ship, obey the said master and officers

having command and charge of the ship, but wholly neglected and refused so to do; and disobeyed their lawful commands, and violated his contract and agreement, and became mutinous, and attempted to excite a mutiny on board said ship, while at sea at divers times." Whatever may be the sufficiency of such an allegation in a declaration at common law, founded on the shipping articles, as it has no specification of time, place, occasion, or other circumstances, it is far too loose and general in its texture to found any defensive allegation in proceedings in the Admiralty. Every charge of such a nature is there expected to be propounded, or, as it is technically phrased, articulated, in distinct articles in the answer, with due certainty of time, place, and other circumstances, so that the Court may distinctly see, to what charges in particular the evidence applies. If, therefore, a preliminary exception had been taken to the admission of the charge, thus generally and loosely framed, I should not have doubted, that the charge ought to have been expunged from the answer. As it is, I am clearly of opinion, that it is wholly insufficient in point of law to be acted upon by this Court; and therefore, I should, if I did not deem it unsupported by the evidence, (as I certainly do,) deliver myself from all consideration of it. Where a charge of general and habitual misconduct is to be made out, it should be propounded in exact terms for the purpose; where specific acts of misconduct are to be relied on, they should be specifically put in issue, with due certainty and exactness of statement.

But the more important matter of defence, asserted by the answer, is, that on the return voyage, to wit, on the 10th of February, 1832, while the ship lay at Stonington in Connecticut, where she had been waiting for the opportunity of favorable winds and weather to return to her proper home port of destination, (Fairhaven, in Massachusetts,) and when

orders were given to prepare for going to sea, the libellant used abusive language to the second mate of the ship, and refused obedience to orders; and clenched and assaulted the second mate; and told the chief mate he ought to be murdered; and assaulted and abused the chief mate; and conducted himself in so insolent and mutinous a manner, as to excite a mutinous spirit in many of the crew; so that the pilot on board refused to proceed to sea with the libellant on board; and it was in fact unsafe so to do; and that when the libellant had been secured, and before the pilot could get the ship out to sea, the wind changed, and the ship got upon dangerous rocks, and was greatly damaged; all of which damage was sustained in consequence of the very gross and mutinous misconduct of the libellant, and his disobedience of the lawful commands of the master and officers. The answer farther asserts, that the libellant was logged for the said offence by an entry in the log-book; and that the master went on shore, and entered a protest against him; and was obliged to confine, and did confine him, and keep him confined until the ship was moored in Fairhaven, where he was committed to prison in due form for trial for his mutinous conduct; and he did not return to the ship again. And it proceeds to allege, that the premises constitute a legal cause of forfeiture of the libellant's share of the proceeds; and that the damage sustained exceeds the value of that share.

The charge thus set up in its actual presentation is certainly of a very high and aggravated nature. If it were completely borne out in its full extent by the evidence, it would call for the severe animadversion of the Court. Some parts of the charge are, however, wholly unsupported, not only in form, but in substance. Thus, the answer would lead us to suppose, that the ship's going on shore, and receiving an injury was the direct and immediate effect of the misconduct

of the libellant. Now, the fact is, that the misconduct of the libellant, whatever it was, took place early in the morning of the 10th of February, 1832. The master went on shore and made a protest, and after several hours' absence returned on board again; and the wind having then shifted, it became improper to put to sea; and the ship during the succeeding night, by the violence of a storm, drifted her anchors and went ashore. So that the injury in no sense, legal or moral, resulted from the misconduct of the libellant, but was a mere maritime casualty. The damage, then, was not attributable at all to the libellant. It was not a consequence of his misconduct, but remote and contingent. And he is not in any measure responsible for it; for the rule of law, as well as of common sense, is, *Causa proxima, non remota, spectatur.*

As little foundation is there, in my judgment, for the charge, that there was real danger to the ship in putting to sea with the libellant on board, from any mutiny of the crew. No such spirit was exhibited on their part, and no disobedience of orders ensued; although, if some parts of the testimony are to be believed, the libellant endeavoured to provoke them to it. And if the libellant's being on board was dangerous to the safety of the ship, it was clearly the duty of the master to put him on shore, and not to hazard the voyage by retaining him, as he did, on board in irons. This act cannot, as I think, be fairly under the circumstances attributed to a mere desire to provide for the safety of the ship; for that might have been accomplished by the more summary process of dismissal; but to a desire to punish the libellant for his misconduct. That all the rest of the crew duly performed their duty at Stonington, and until the termination of the voyage, without any insubordination, is manifested by the whole tenor of the evidence.

The case, then, stands singly upon the asserted misconduct of the libellant in disobedience of orders, in using insulting language, and in assaulting and striking the chief and the second mate at the time stated in the answer. And my opinion is, upon a review of the whole evidence, that the charge is distinctly in substance made out. It is sufficiently apparent, that the libellant and the second mate entertained no very good will towards each other; and that the libellant was not slow to use his opportunities to exhibit it. His conduct on the preceding evening was very gross and insulting, and utterly without excuse; though it did not amount to any thing more than contumacy and abusive language. And, as far as the conduct of the second mate has appeared in evidence, it was certainly that of a civil and humane officer. The truth seems to be, that the libellant is a man of quick passions and resentments, and could ill brook the commands and authority of the second mate, who was a foreigner by birth, (a Portuguese,) and towards whom he indulged a good deal of that contempt and pique, which is certainly an infirmity, if not a disease, in the American nautical character. That, in the affray on the morning of the 10th of February, the libellant was greatly to blame, if not wholly without excuse, is in my judgment clearly established by a decided preponderance of the evidence. I am also satisfied, that he struck both the first and second mate without any suitable justification. He was in a furious passion, and gave way the more readily to it, thinking that in the American waters he could more freely exercise his rights, according to his own boastful language, than he dared to do under the guns of a Portuguese fort. It is high time he should learn, that the American laws protect no man in insolence, disobedience of orders, mutinous conduct, or personal attacks; and least of all protect the

crew of a ship in such conduct towards their superior officers. The master was, therefore, fully justified in putting him in irons on this occasion by way of punishment, as well as of security. And I cannot but think, that the subsequent conduct of the libellant during the passage to Fairhaven was such as aggravated the original offence. It was not only wholly without contrition, but in a spirit of cool and determined bravado. If a different course of conduct had been pursued, there might have been much to mitigate the offence; for repentance and an offer to return to duty are of high value and import in the Maritime Law. As the case stands, I should ill administer the true principles of that law, if I did not say, that the case called upon the Court for an exemplary admonition. I do not think, that under all the circumstances I should be justified, for a single offence of this nature, in declaring a total forfeiture of the libellant's share of the proceeds. But I shall direct a deduction to be made of one hundred dollars from the amount remaining due; and each party must bear his own costs in this Court. In other respects the decree of the District Court is to be affirmed.

It is proper to add, that the main evidence, by which my judgment has been influenced in this decision, was never brought before the District Court; so that there is no reason to consider, that there would have been the slightest difference of opinion upon this case between my learned brother and myself, if we had been called to decide it upon a similar posture of the evidence.

Decree accordingly.

CHARLES TREADWELL, APPELLANT,

v.

HARRY JOSEPH, APPELLEE.

In Admiralty causes of damage, the libel should state each distinct act of injury in a distinct article with reasonable certainty of time and place.
Where a defence is put in, by way of justification, it must admit the facts.
Where the act is relied on as a punishment, it must be so pleaded.
In cases where a justification is set up, the *onus probandi* is on the respondent.
Decree for damages for wrongful assault and imprisonment.

STORY J. This is a suit brought in the Admiralty by the original libellant, now appellee, against the appellant, who was the original respondent, *in personam*, in what is technically called a cause of damage. The charges in the libel are of gross maltreatment, and wrongful assault, and imprisonment of the libellant, who was a seaman on board the ship Forum, by the respondent, who was commander thereof, on the high seas, and within the jurisdiction of the Court.

The matter in the libel resolves itself into two distinct charges, each of which ought to have been propounded in a distinct article, with reasonable certainty of time and place, instead of being mixed together in one general statement; for they were not contemporaneous, nor in any exact sense a continuation of the same injurious proceeding. I cannot but express my regret at finding this anomalous and loose course of practice so long pursued; and I trust it will soon be reformed by more exact pleadings.

The first charge is, that the respondent did with force and violence, without rightful cause or justification, order the libellant to scrape down the masts of the ship for a long space of time, to wit, for fourteen hours, the wind then blowing heavily. The answer of the respondent to this charge is, "that the scraping of the masts of a ship is a necessary duty,

and proper to be performed by the mariners thereof; and that, *if* the libellant was employed in that manner, it was a part of the ship's duty, which the libellant was bound by his enlistment on board the vessel to perform." Now, this answer is insufficient, both in matter and form. It neither admits nor denies the act complained of; but states conditionally, that, "*if* the libellant was employed, &c., it was a part of the ship's duty," &c. It is clear, upon the first principles of all responsive pleadings, that the party, who sets up a justification or excuse of any act, must admit the existence of that act; and if he denies it, his denial must be in positive terms. A defensive allegation in the Admiralty equally as much requires this certainty, as a plea at the common law. A party cannot put forth a sort of middle and speculative answer, neither admitting nor denying any thing. He should meet the charge of the libel with direct allegations. Besides, the answer does not reach the gravamen of the charge. Admitting it to be a part of the duty of the crew to scrape the masts, it is to be done at proper times and seasons, and in a reasonable manner. If it is required under circumstances of oppression, or wantonness, out of mere resentment, the order is not justifiable, nor the duty demandable. A seaman is not a slave; he is entitled to fair treatment; and is not to be overcharged with duty from caprice or dissatisfaction. Hence, whenever the act is charged as oppressive, it should be specially shown, that it was proper on the particular occasion, and was not oppressive. On the other hand, if it be inflicted as a punishment, the cause should be specially set up, and shown to be a justification. In the present case, giving the utmost effect to the averments of the answer, it does not show, that such a prolonged duty for such a period of time was either proper or necessary for the occasion. And it is impossible to sustain the answer, as insisting upon it as a mode of punishment.

And yet the whole scope of the evidence leads the mind almost irresistibly to the conclusion, that it was required, as a mode of punishment for some incorrect conduct towards the master. I am compelled, therefore, to say, that not being justified in the pleadings, as a punishment, and yet being in fact such, it stands in the actual presentation unexcused. Indeed, if the testimony introduced into the cause by the master for another purpose, be true, the proceeding would deserve no small reprehension; for it would then appear, that the libellant was at the time known to be seriously indisposed, and in some sort wandering in his mind.

The other charge is of a more serious character, though in its frame it is quite too loose and inartificial. It is, that afterwards the master illegally and unjustifiably deprived the libellant of his food, keeping him upon rice-water and physic; and without cause imprisoned him in the hold of the vessel; and blistered him, and shaved his head, and lashed his hands behind him, and bound him to a stanchion below, whereby from the steam of the cargo (coffee) he was nearly suffocated, and he was deprived of sleep. The answer to this charge asserts in substance, that the libellant complained of pains in his head and back, and medicine was accordingly administered to him; that on the next morning he appeared more ill, and exhibited marks of derangement of mind, and the respondent thought it necessary to bleed him; and afterwards, the libellant still continuing in the same delirious state, the respondent caused his head to be shaved and blistered, and blisters also to be applied to his neck; that he caused the libellant to be placed in the steerage between decks, near the after hatch, where he could enjoy fresh air, and at the same time be protected from the weather and from disturbance from the crew; and in order to prevent him from wandering about the ship in the state of delirium, in which he was, the respondent con-

fined him to a stanchion for about two days, until he recovered his mind, and became sufficiently rational to be trusted.

If this statement be true, it certainly amounts to a justification. But I am of opinion, that nothing short of substantial proof of the facts can sustain it, as a defence. Even if the respondent acted with entire good faith, but the libellant was not in a state of derangement or delirium, the defence must fail, although a mere mistake of judgment would certainly go very far in mitigation of damages. The *onus probandi* is here on the respondent; and unless he clears away every reasonable doubt, he must take upon him the consequences of his rashness, or want of skill. Now, I must say, that the evidence has, in my judgment, wholly failed to establish any clear, unequivocal case of derangement or delirium. And the conduct of the master seems to me to show an undue precipitancy, and a good deal of harshness and severity, uncalled for by the occasion. Nor am I able, upon examining the evidence, wholly to escape from the suspicion, that there were mixed up in these medicinal administrations some ingredients of resentment and punishment. The prescriptions were not so mild in their nature, nor the nursing so gentle or cautious in its quality, as to remove all doubt, that some wholesome correction for past faults mingled its share in the discipline.

If I were to reverse the decree of the District Judge, it would be to act upon a mere private opinion, which disregarded the weight of evidence. My opinion is, that it ought to be affirmed, with costs.

Decree accordingly.

United States v. Thaddeus Coffin.

Indictment for maliciously and without justifiable cause forcing a seaman on shore, in a foreign port, against the Crimes Act of 1825, ch. 276, § 10. "Maliciously," in the Statute, means wilfully, against a knowledge of duty. "Justifiable cause" does not mean such a cause, as in the mere Maritime Law might authorize a discharge; but such a cause, as the known policy of the American Laws on this subject contemplates, as a case of moral necessity, for the safety of the ship and crew, or the due performance of the voyage.

Indictment for maliciously and without justifiable cause forcing a seaman of the ship Fabius on shore in a foreign port, to wit, at the Sandwich Islands, contrary to the Crimes Act of 1825, ch. 276, § 10. Plea, general issue, not guilty.

The cause was argued by *Dunlap*, District Attorney, for the United States, and by *Bartlett* for the defendant.

Story J., in summing up to the jury, said: In this case, it is admitted, that the ship Fabius is an American ship, and Frederick Daniels was one of her crew, and the steward of the ship on a whaling voyage to the Pacific. It is also admitted, and indeed is proved beyond all controversy, that he (Daniels) was forced ashore by the direct orders and instrumentality of the master, at the port of Mahee in one of the Sandwich Islands, against his will, and landed on the beach there with his chest, without any means of subsistence, for the purpose of finally separating him from the ship for the voyage. He (Daniels) is by birth a Dane; and (it is said) has been naturalized; but that fact is not proved by the proper record evidence. Under these circumstances, it is contended, in the first place, that by the Act of 1813, ch. 184, foreign seamen cannot be lawfully employed as part of the crew of an American ship; and in the next place, if they can, that the Act of 1825, ch. 276, § 10, on which the present indictment is founded, applies only to seamen in American ships, who are citizens. My

opinion is, that the argument is not well founded in either respect. The Act of 1813, ch. 184, declares, indeed, that after the then war with Great Britain, it shall not be lawful to employ on board of any public or private vessels of the United States any persons, except citizens. But the tenth section of the same Act suspends the operation of the Act, as to the employment of seamen, who are subjects of any foreign nation, which shall not by special treaty with the United States have prohibited the employment on board of her public or private ships of white citizens of the United States. Denmark has made no such treaty stipulation; and, therefore, the clause, as to subjects of that country at least, remains inoperative.

Then, as to the Act of 1825, on which the present indictment is founded, its language is general, and equally applicable to all seamen constituting a part of the crew of an American ship, whether foreigners or natives; and I can perceive no public policy, which would justify the Court in construing the words as confined to the latter. So long as foreign seamen are permitted by our laws to be employed on board of American ships, they must be deemed admitted to the protection of those laws; as they are certainly responsible both civilly and criminally for any violation of them. It would be a most extraordinary predicament to hold them liable for the latter, and at the same time to deny them all benefit of the former. No such invidious distinction is at present established in our legislation. The language of the tenth section is: No master, &c., "shall during his being abroad maliciously and without justifiable cause force any officer or mariner of such ship or vessel" (not any American officer or mariner) "on shore, or leave him behind in any foreign port or place, or refuse to bring home again all such of the officers and mariners of such ship or vessel, *as he carried out with him*, as are in a

condition to return, and willing to return, when he is ready to proceed on his homeward voyage," &c. Now, it is plain, that the home here referred to is not the particular home of any seaman, native or foreign; but the home port of the ship for the voyage.

Then, what is to be deemed a "justifiable cause" in the sense of the Act? It is argued, that whatever misbehaviour would by the general principles of the Maritime Law constitute a sufficient cause to discharge a seaman in a foreign port, is a "justifiable cause" in the sense of the Act. But it seems to me, that this is laying down the rule much too broadly. It is not, indeed, every offence committed by a seaman, which will, even by the Maritime Law, authorize the master to discharge him in a foreign port. It must be some offence of a high and aggravated character; or long and habitual disregard of duty; or other continued misconduct, unrepented of and unchanged. But the laws of the United States, from motives of an enlarged policy, have circumscribed the authority of the master in cases of discharge within much more narrow bounds. It is well known, that in former times the government were put to very great expenses for the relief and maintenance of sick, disabled, and other seaman, who were discharged, or left abroad by masters of American ships under various pretences, often exceedingly frivolous, and sometimes from a spirit of revenge or passionate excitement. The evil became so extensive, and so burdensome, that by a Statute passed in 1803, (Act of 1803, ch. 62, § 1,) masters of ships on foreign voyages were required to give bonds with security for the due return of all the seamen, who were engaged for the voyage; and by a proviso in that Statute it was declared, that the bond so given should not be forfeited on account of the master's not producing any of the crew, who might be discharged in a foreign country with the consent of the

American consul, or other commercial agent, in writing; nor on account of any of the crew dying, or absconding, or being forcibly impressed into another service. And another section of the Act (§ 3) provided for cases, when the vessel is sold, or a seaman is discharged with his own consent in a foreign country. Now, looking to the obvious policy of this Act, it is impossible not to feel, that Congress meant to admit no excuses under the bond, except in extreme cases, where the consul authorized the discharge, or the seaman died, or absconded, or was impressed. The present case does not fall within either of these classes of cases. But I am not prepared to say, that others may not exist, not mentioned in the Statute, which yet would constitute a justifiable cause of a discharge. But I think the right to discharge seamen can result only from what may be deemed a moral necessity, analogous to the cases put in the Statute. Suppose for instance, a seaman should make a revolt on board of a ship, or endeavour to make such a revolt; and should persist in his misconduct, so that his farther continuance on board would be hazardous to the master and crew, and the objects of the voyage; it seems to me, that it would constitute a good cause for a discharge. So, if a seaman should commit a manslaughter, or assault any of the officers or crew with an intent to kill, or otherwise conduct himself in such a malicious and gross manner as to render his presence on board dangerous to the crew and the safety of the ship; the same result would follow. And I am not prepared to say, that even long continued, obstinate, and malicious disobedience of orders, or neglect of ship's duty, indicating a mutinous disposition, and deliberate intent to subvert the ship's discipline, and the government of the crew, would not equally justify a discharge; although it is not expressly within the purview of the Statute. But I think the right arises only under extraordinary emergencies and in

extreme cases, where otherwise the safety of the officers or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline, would be put in jeopardy. The mere convenience of the master would not justify a discharge; much less such offences, as could be ordinarily suppressed by the common punishments administered in the sea-service.

But it is not sufficient, that there should be a want of justifiable cause, to bring the case within the Statute. The act must be maliciously done. Now, "maliciously," in the sense of the Act, is not limited to acts done from hatred, revenge, or passion; but it includes all acts wantonly done, or wilfully done, that is, against what any man of reasonable knowledge and ability must know to be contrary to his duty.[1] Now, every man is presumed to know, what the law ordinarily requires of him in point of duty; and he cannot shelter himself from liability by any pretence of ignorance of that, which, in his station, every man must be presumed to know. Still, if the circumstances are such, that a master of reasonable judgment, acting *bonâ fide*, and not from passionate excitement, might fairly deem it his duty to discharge the seaman; he will not be guilty of the offence intended by the Act. Every master in a foreign voyage cannot but be presumed to know, what the obligation of the bond given by him, to bring home the crew, who go on the voyage, imports. And he cannot but know, what are the excuses allowed by the Act. If he goes beyond them, he acts at his peril, and can justify himself only in a clear case of moral necessity, such as I have stated.

Let us apply these principles to the present case. That the master forced the seaman on shore at the Sandwich Islands is (as I have said) admitted. The *onus probandi*, then,

[1] See *United States* v. *Ruggles*, 5 Mason R. 192. *Phillips's case*, 1 Moody, Crown Cas. 264, 273.

is on the master to establish, that the act was for a justifiable cause; for in the absence of such cause the law will presume, that he did it maliciously, until the contrary is proved. The defence is here mainly rested on the fact, that after the seaman (who was steward of the ship) was tied up to the rigging, and flogged with a cat-of-nine-tails, he never did any duty, until he was discharged; that is, from June to November, 1831; and that this arose from his wanton obstinacy and malice, and determination not to do duty, and not from inability. The answer on the other side is, that the flogging produced a rupture or hernia in the abdomen; and that the seaman was thus rendered wholly incapable of performing duty, and was really, not pretendedly, an invalid. Which of these statements is true? [Here the Judge recapitulated the evidence.] If the jury believe, that the seaman was not injured, as he pretended, by the flogging; but was able to do duty, and obstinately and maliciously refused to do duty, in order to revenge himself, and to destroy the ship's discipline, and to incite others of the crew to disobedience, then the defendant ought to be acquitted. If he was in fact disabled; and the master by reasonable inquiries might have ascertained it; and he chose to act upon his feelings of disgust with the seaman; or rashly upon his own suspicion; then it seems to me, that he ought to be found guilty.

Verdict guilty.

Judgment accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1833, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

The Ship Henry Ewbank, Charleston Fire and Marine Insurance Company, &c., Claimants.

Underwriters cannot make any claim for salvage property in the Admiralty, unless there has been an abandonment of the property to them, and it has been accepted by them.

In salvage cases the proper course is to make all the co-salvors parties to the original libel. And if any are omitted, they need not file a new libel, where the property has been already taken possession of, and is in the custody of the court under process. But they may bring forward their claims by a suitable allegation; and thus make themselves parties to the cause, without the formality of notice or process to the other parties. Where different libels are filed by co-salvors unnecessarily, it is at the peril of paying costs.

In cases of derelict the habit of Courts of Admiralty is to allow one moiety as salvage. That proportion is not departed from unless under extraordinary circumstances.

If salvors, in effecting a salvage service, themselves fall into distress, and are relieved by other salvors, they do not lose their original right to salvage; but the second salvors only partake in the salvage according to their merit. Second salvors cannot lawfully make it a condition of giving assistance, that the original salvors shall abandon all claims to salvage.

An appeal by any parties interested in the distribution of salvage, as to their shares, brings up incidentally a review of the whole decree, so far as the distribution is concerned.

Stoppage on the high seas, to save the lives of a distressed crew in another ship, is not a deviation from the voyage, which discharges a policy of insurance. But a stoppage merely to save property is a deviation.

In the distribution of salvage, the owner of the salvor ship ought under ordinary circumstances to be allowed one third of the salvage. In cases of extraordinary merit, or extraordinary peril to the ship, he may found a claim to higher salvage.

Rule of apportionment between the master, officers, and crew; and between co-salvors.

Salvors are *ex necessitate* admitted as witnesses to all facts, which are deemed peculiarly or exclusively within their knowledge. To other facts they are incompetent witnesses.

What constitutes a case of derelict.

Apportionment of costs among co-salvors and claimants.

STORY J. This is a libel of salvage in the case of an asserted derelict. The ship Henry Ewbank, Jeremiah N. Jaques, master, owned in Charleston, (S. C.) sailed in February last from that port with a cargo of cotton and rice, bound to London. In the course of the voyage, having met with severe disasters, and lost her rudder, she was on the 12th of March, in latitude 42° 5′ and longitude 53° 50′ W. abandoned by the master and crew, who on the same day were taken up by the ship Marmora, of Boston, and afterwards safely arrived at that port. At the time of the abandonment, the ship (as described by Captain Jaques) was completely unmanageable; her cargo (the rice being stored in bulk) was shifting, so as to throw her gunwale into the water in every gale; and she was waterlogged, and in imminent peril of foundering from the nature of her cargo, and her forlorn situation. On Monday, the 1st of April, the British Barque Hope, Lister master, bound on a voyage from Liverpool (England) to New York, with a large number of passengers on board, and a cargo consisting of salt, coals, and iron, fell in with the Ewbank in latitude 40°, longitude 54° W. The Hope was at this time, from the length of the passage, and the deficiency of provisions, in a disturbed and suffering state, from which she was greatly

relieved by obtaining a supply from the Ewbank. The master of the Hope, with the consent of the owner of the latter, who was then on board, concluded to undertake the enterprise of getting the Ewbank into port; and accordingly his mate, Mr. Metcalf, and a suitable crew, consisting of four seamen and six passengers, were finally selected for the purpose. When the Ewbank was boarded she was found stanch and strong, but without any rudder, and with nine feet of water in her hold. The Hope remained by her from Monday, the 1st, until Friday, the 5th of April; and during that period the crew were employed in making a new rudder and other arrangements preparatory for their separation, which took place on the same day. After parting company the Ewbank encountered severe weather, and the new rudder, which was a sweep, was found, after a few days' trial, altogether inadequate for the purpose, and was taken on deck. A new rudder was then constructed; but it was found impracticable to attach it in the proper position, from the prevailing heavy seas and violent winds. It was, therefore, fastened astern by a rope, which parted in the night, and thus it was lost. From that period the ship was steered wholly by her sails; continual pumping was required; little effort was made towards constructing a new rudder; and the ship was left in a good measure to drift about at the mercy of the winds and waves. This state of things remained until the 1st of May, when they fell in with the brig Padang, of Boston, Brewster master, bound to New York with a valuable cargo on board. At this time they were in latitude 40° 16′ and in longitude 48° 30′; and of course they had within the last twenty-seven days lost several degrees of west longitude. The crew of the Ewbank were in a state of great discouragement and exhaustion, and in want of provisions; and were (as, I think, it cannot well be denied) en-

tirely willing to give up the whole enterprise. After some negotiations with Captain Brewster, who was unwilling to take all the crew on board his own vessel for want of suitable accommodations, it was concluded to make an attempt to fix a new rudder, and to get the Ewbank into port. Accordingly, with the consent of the original salvors, Mr. Wheelwright, (the chief mate of the Padang,) with the assistance of some of the Ewbank's crew, constructed a new rudder, and hung it in a very ingenious and skilful manner; and, a new crew (in number seven) having been formed, consisting partly of four of the original salvors, and partly of three seamen from the Padang, the Ewbank, under the command and direction of Wheelwright and Metcalf, proceeded on the voyage, and safely arrived at Boston on the third day of June last. The Padang remained by the Ewbank until the new rudder was constructed and hung, and other suitable arrangements were made for the voyage, having had her in tow a part of the time. She then proceeded on her own voyage, and arrived safely at New York on the 14th of May last.

Such is a very brief outline of the more general facts, which are given with great particularity and clearness in the opinion of the learned Judge of the District Court, to which I may thus generally refer for more minute facts. I may, by and by, have occasion to glance at some facts of a controversial nature, upon which there is great contrariety of declaration by the witnesses.

The cause came before the District Court upon proceedings instituted, in the first place, on the 3d of June last by a libel by Mr. Manners, His Britannic Majesty's Consul, for and in behalf of the owner, master, officers, and crew of the Hope, for salvage. Upon this libel a warrant of arrest issued, upon which the Ewbank and her cargo were taken into

custody by the Marshal. In this libel no mention whatever is made of any other persons as co-salvors. On the sixth of July, another libel was filed by Wheelwright and others, (including all the crew, who navigated the Ewbank into port, except Metcalf,) stating the general facts, and averring, that there was an entire abandonment of the Ewbank by the original salvors; and a new enterprise undertaken by themselves; and excluding Metcalf from any share in the salvage, on account of his asserted neglect of duty and desertion; and concluding with the declaration, "that the said vessel and cargo were saved by the labors and service of your libellants, without the assistance of any other person or persons whatsoever." In this libel, also, there is a total omission to state any claim in behalf of the owner, master, and other part of the crew of the Padang; and, indeed, upon the structure of the libel there would seem to be a studied disinclination to admit any such claim. Afterwards, on the same day, another libel was filed by Blaise Isserverdens and others, owners of the Padang, in behalf of themselves, and the officers and crew of the Padang, for salvage, repelling the libel and claim of the Hope, and praying, "that no award of salvage be made to the libellants named therein." On the seventh day of June, another libel was filed by George Brewster, denying the claim of the Hope to any salvage, and praying salvage to be awarded to the owners, officers, and crew of the Padang. On the eighth day of June, a libel was filed by George Weissell, the second mate, and others, the seamen of the Padang, denying the claim of the Hope to any salvage, and praying salvage for the benefit of the owners, officers, and crew of the Padang. And lastly, on the second of July, a libel was filed by James Turner, one of the passengers, and an original salvor from the Hope, stating, that he was by artifice induced to go on board of the Padang, and could not return to the Ewbank,

and praying salvage. Upon all these libels, except that of Turner, process issued in the common form, which was also served by the Marshal.

A claim was interposed by the Charleston Fire and Marine Insurance Company, to which the Ewbank had been duly abandoned, and the abandonment accepted, praying for restitution after an allowance for salvage. A claim was afterwards interposed by William S. Skinner, agent for the underwriters at Lloyd's, and also for the association of underwriters at Liverpool and Glasgow, stating his belief, that they have an interest in the property, of which he would thereafter produce proofs. Upon this claim I need scarcely say, that underwriters, as such, have no right to intervene in this Court, unless the property is abandoned to them, and is accepted by them, so that they have an interest in the thing, and not a mere interest in the cause. A claim, so generally framed as that of Mr. Skinner's, and so naked of all apparent interest, can have no other influence upon any court, than as furnishing some ground for delay, until proper inquiries can be made to ascertain the actual absent interests. But this, in salvage cases, would hardly be granted, unless upon circumstances of great stringency and force. I dismiss from my mind, therefore, all future consideration of this claim, which, indeed, in a technical sense, is not before the Court.

Upon the final hearing of the cause, the District Court decreed a salvage of one moiety of the net proceeds of the Ewbank and cargo (the same having been sold under an interlocutory order of sale), amounting to $31,488·37, and the decree distributed this salvage as follows: Three fifths of the salvage to be given to the owners, officers, and crew of the Padang; namely, one half to the owners, and the remaining one half to be divided into twenty-one shares, of which Capt. Brewster was to receive six, Wheelwright three, Weissell two, El-

dridge and Betts, (salvors on board of the Ewbank,) two, and the residue of the crew (four) one share each. The remaining two fifths of the salvage were decreed to the owner, officers, and crew of the Hope; namely, to the owner one half; the other half to be divided into twenty-five shares, of which were decreed to Captain Lister six shares, to Metcalf three shares, to Watkins, Green, James, Marshall, Duggin, Turner, and Leman, (original salvors belonging to the Hope, and, except Turner, remaining during the whole voyage on board of the Ewbank,) two shares, and to the residue of the crew of the Hope (nine) one share each. The Court also decreed the libel of Wheelwright and others, of Brewster, and of Weissell, to be dismissed without costs to either party, a compensation to them being decreed under the other libels, and the expenses to be paid out of the gross proceeds.

From this decree there were divers appeals interposed. The first was by the owner, officers, and crew of the Hope, to so much of the decree as awarded three fifths of the salvage to the Padang, and limited that of the Hope to two fifths. The next was by Grace, Watkins, Marshall, and Duggin, from the decree, so far as regarded the amount awarded to them; and the appeal asserted, that Metcalf was entitled to nothing, and that Hough ought not to have a double share. Wheelwright also claimed an appeal with Grace, Watkins, Marshall, and Duggin, upon their joint libel, on account of the dismissal thereof. Wheelwright also claimed an appeal on account of the insufficiency of the salvage decreed to himself, as well as for other special causes. And lastly, the owners of the Padang claimed an appeal from the decree, so far as regarded the amount of salvage, and the portion thereby decreed to the Hope, and for other causes. No appeal was interposed by the Charleston Insurance Company, or by any other of the parties. But the actual appeals necessarily bring before

the Court all the substantial merits of the case, as to the amount of salvage, the persons entitled to salvage, and the proper distribution thereof.

Before I proceed to the principal matters, the state of the pleadings requires me to make a few preliminary remarks, especially as in the present case they involve some questions of costs. There is certainly a very unnecessary multiplication of libels in this case; and it is matter of regret, as well as of surprise, that a different course was not pursued in instituting the original proceedings. It would have been far more for the credit of all the parties concerned in all these libels to have admitted with frankness and distinctness all the claims of all the other salvors. There was, however, a studied desire on the part of all the libellants to bring forward in bold relief their own merits, with a studied suppression, or a very feeble acknowledgment of the claims of other salvors. The libel of the Hope has wholly forgotten the existence of the Padang. That of Wheelwright and others makes no mention of the owners of the Padang; and sets up an exclusive claim to salvage for themselves, as being the only salvors in the new enterprise, without the assistance of any other person whatsoever. The libel of the owners of the Padang repudiates the claim of the Hope, in which respect it is closely followed by the libel of Captain Brewster. So that it is impossible, in the actual posture of the facts, not to perceive, that there has been as little ingenuousness, liberality, and fulness of statement on any side, as could well be presented to the attention of the Court. One cannot wink so hard as not to see, that, trusting to the libels alone, as a suitable guide to inform the Court of the facts, it would have been impossible for the Court not to have been led astray, and to have made shipwreck of the cause. If the demerit in these particulars had rested solely on Wheelwright and his co-libellants, I

should have entirely concurred in the judgment of the District Court in dismissing the libels, if not in form, at least in fact, by a denial of all costs. But it seems difficult to distinguish his case successfully from that of the libel of the Hope, and even from that of the owners of the Padang, who, while setting up their own claims, have not only denied those of the Hope, but have also forgotten those of the co-salvors of the Hope, who actually assisted in navigating the Ewbank into port. All the libels, then, have the same common defect, that no one of them states all the facts, and all the claims of all parties; but all intentionally set up a special and exclusive merit and service. Justice, then, I think, does not require the Court to single out the libel of Wheelwright and others for its peculiar displeasure, or to make the parties to that libel the victims of a dismissal, which shall put upon them the burden of their own costs. I observe, too, that all these libels were served by the Marshal, a proceeding by no means necessary, when the property is already in the custody of the Court, upon any libel executed *in rem*; for then all other parties, whether they stand in the character of libellants or of respondents, may assert their respective claims by allegations filed in the Court, which, being admitted by the Court, are necessarily brought to the notice of all the other parties, who may contest them without the formality of a notice by process. In all cases, where unnecessary libels or claims are filed, it is at the peril of paying costs.

In truth, there ought not to have been in the present case more than two libels; one on behalf of the owner, officers, and crew of the Hope, and the other on behalf of the owners, officers, and crew of the Padang, standing, as they do, upon adverse rights.[1] Upon these libels the amount of the

[1] See *The Baltimore*, 2 Dods. R. 132, where the owner libelled separately.

whole salvage might have been properly ascertained, and the relative claims of the Hope and Padang to share in it disposed of. If afterwards there had remained any conflicting interests or rights of the different salvors relative to their shares in the distribution of the salvage, they might properly at that stage of the proceedings have been brought forward by separate allegations, each party intervening *pro interesse suo*, as to the matters in conflict. In this way much of the complexity of the cause would have been avoided; and the litigation would, in every stage of it, have assumed the distinct character properly belonging to it; and the Court would have been enabled to fix upon the proper parties, engaged in these collateral controversies, the just and exclusive responsibility for the costs occasioned thereby. Sitting in the District Court, I should not have had the least hesitation in staying proceedings upon all the collateral libels, until the principal question of salvage had been disposed of; and then to have required these libels to be reformed, so as to bring forward only the peculiar claims of the parties respectively. One cannot but perceive, how large a mass of the voluminous testimony in this case is taken up in these collateral controversies, with the merits or demerits of which other parties have nothing to do. What, for example, have the Charleston Fire and Marine Insurance Company to do with the distribution of the salvage, or the relative merits of the different co-salvors? It is not of the slightest importance to them, in what manner that distribution takes place, or who are the parties to it. The only important consideration to them is the amount of the salvage. And there is not the slightest pretext for burdening them either with the delays or the expenses incident to the distribution among the salvors. There is, unfortunately, little of the whole mass of evidence, which bears upon this point of salvage; and that little is scarcely a

matter of controversy between the parties. If, indeed, it were now practicable to separate the portion of the evidence bearing on the merits of the salvage from that bearing on the merits of the different salvors, I should be much disposed to apportion the costs accordingly. That is not now practicable; but the Court will have some regard to it, when it comes to the apportionment of the costs.

Passing by, for the present, any further consideration of these matters, which are preliminary in their nature, I come, then, in the first place, to the question, what amount of salvage ought to be decreed? The District Court allowed (as we have seen) one moiety; the Insurance Company have acquiesced in this allowance; and so have the owners, officers, and crew of the Hope. The amount is contested by the other parties appellant, who ask for an increase of salvage, asserting, that it is not sufficient to compensate them for their labors, or in proportion to the merits of the salvage service. At the argument I intimated a strong disinclination to change the amount of salvage; and upon the most mature reflection I adhere to that opinion. This is a clear case of derelict, for there was an abandonment of the property, *animo non revertendi*. In such cases the habit of Courts of Admiralty has been to decree one moiety to the salvors; and by the old law no more than that was ever decreed. That rule, however, has been somewhat relaxed in modern times; but still a moiety continues to be the favored, if not favorite, proportion allowed by Courts of Admiralty in ordinary cases.[1] It is not, however, an inflexible rule; but it yields to extraordinary circumstances, greatly diminishing or enhancing the

[1] See *The Fortuna*, 4 Rob. R. 193. *L'Esperance*, 1 Dodson R. 46. *Rowe* v. *The Brig* ——, 1 Mason R. 372. *The Blendenhall*, 1 Dodson R. 414, 421. *Elliotta*, 2 Dodson R. 75.

perils, and gallantry, and personal sacrifices of the salvage service. But the Court on all occasions has great reluctance in deviating from a moiety, and expects a very strong case to be made out; in which, upon other principles, there would be a very great disproportion between the services and the compensation; so great, indeed, as in a moral and legal view to constrain the Court to deviate from it. And there is great wisdom in thus adhering to the rule; for nothing can be more inconvenient in the administration of justice, and especially of international justice, *ex æquo et bono*, than to leave every case open to the mere exercise of an unlimited discretion. Certainty in this case, as in many other cases, is far more important than mere theoretical propriety. In salvage cases it is not ordinarily in the power of a Court of Admiralty to fix any exact rules, which will suit many classes of cases. But whenever they can be fixed, the tendency of fixed rules to suppress litigation, and to produce uniformity of decision, is so apparent, that a judge must have more than ordinary boldness, or confidence, or presumption, who will venture to cut himself adrift from all rules, and launch upon the broad ocean of discretion, without taking counsel of the wisdom of his predecessors. For myself, I have not the slightest inclination to adventure upon such a course. I have hitherto adhered with an unshrinking confidence to the general rule of a moiety in cases of derelict. It has the support of the authority of the ablest judges for many ages;[1] and in an especial manner of that Court, whose judgments I am bound to hold in the highest respect. On this subject I have the less need now to speak, as in the case of *Rowe* v. *The Brig* —— (1 Mason R. 372) I had occasion to give my opinion at large

[1] See *The Fortuna*, 4 Rob. R. 293. *L'Esperance*, 1 Dodson R. 46. *The Blenden-hall*, 1 Dodson R. 414, 421. *Elliotta*, 2 Dodson R. 75.

upon this subject. To that opinion I still attach myself with unabated satisfaction. I am aware, that by the ordinance of Louis the 14th, one third is the rule of salvage fixed in all cases of derelict.[1] It is, however, one third clear of all expenses, or one third of the gross value, an amount in many cases not materially different from a moiety of the net proceeds, given by the common rule of the Admiralty Courts. Even this positive regulation of the French code would, if adopted generally, be far more convenient than to leave the proportion utterly unsettled; though I deem the rule of a moiety better adapted to the ordinary cases of derelict.

Now, unless I were prepared to shake the common rule to its very foundation, there are no circumstances in the present case calling upon the Court for the slightest deviation from it. It is an ordinary case of derelict in all its features, without any uncommon perils or difficulties, or any distinguished gallantry. The property saved is large enough to give a reasonable salvage at that rate; it is not so large as to make it an extravagant compensation. And I agree, that the value of the property saved constitutes a material ingredient in decreeing salvage.[2] If there were any uncommon perils, sacrifices, or sufferings, they were borne by the original salvors from the Hope, before the Padang was fallen in with. But I am by no means prepared to admit, that there were any not fairly to be expected under like circumstances, or not easily to be borne by men of common skill, constancy, and firmness. If the salvors of the Hope had succeeded in getting the Ewbank into port without assistance, they could hardly have made out a higher claim. That they have accomplished it with the as-

[1] 2 Valin Comm., Lib. 4, tit. 9, art. 27, p. 635, &c.

[2] See *The Blenden-hall*, 1 Dodson R. 414, 421. *The Waterloo*, 2 Dodson R. 433, 442.

sistance of others does not enhance their own merits, but rather lets in the latter to share in the appropriate salvage. Indeed, no demand of a higher salvage is now made in behalf of the Hope, though some of her crew, connecting themselves with Wheelwright's libel, do assert such a claim. It is not by glowing sketches of common services, or by strong and vivid coloring impressed upon common incidents, that salvage is to be inflamed to an undue amount. Salvage, it is true, is not a question of compensation *pro operâ et labore*. It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers a premium, by way of honorary reward, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life. Treated as a mere question of compensation for labor and services, measured by any common standard on land or at sea, the salvage of one moiety is far too high. But treated, as it should be, as a mixed question of public policy and private right, equally important to all commercial nations, and equally encouraged by all, a moiety is no more than may justly be awarded. In this respect I entirely approve of the decree of the District Court.

The next question is, who are entitled to be deemed salvors? The owners, officers, and crew of the Padang contend, that they, and those, who actually navigated the Ewbank into port, are exclusively to be deemed the salvors; and that the owners, officers, and crew of the Hope, as such, are not entitled to share in the salvage. For this purpose they assume two grounds of argument; first, that the Hope rendered no effectual service to the Ewbank; and, secondly, that there was a total abandonment of the original enterprise by

her crew, and an entirely new enterprise undertaken by a new crew on meeting with the Padang. It appears to me, that neither ground is maintainable, either in law or in fact. That the Hope was the first and original salvor does not, upon the evidence, admit of the slightest doubt. She found the Ewbank in a state of derelict, and put a salvage crew on board; thus taking possession, and entitling them and herself to be deemed the exclusive salvors, unless the possession should be afterwards totally abandoned, and the enterprise surrendered. No other persons, without their consent, could intrude themselves upon that possession, or gain a title to be deemed co-salvors; and whoever, during that possession, should come in, with their consent, must be deemed to come in under that title, and not in exclusion of it. The crew of the Hope navigated the Ewbank for thirty days, exposing themselves to every peril, encountering every hardship, and struggling against adverse circumstances with all the skill, and ability, and vigor, which they possessed. During this whole period, then, they actually preserved the Ewbank; and, from the very nature of the case, there is not only no evidence, that she could have been preserved without their superintendence during this period, but there is the highest probability, that she would otherwise have foundered. We are not to indulge mere possible conjectures on such subjects. The fact, that she was thus saved, is clear; the presumption, that she might have been otherwise saved during this long period, is mere matter of conjecture, *in nubibus*. It is not the habit of any courts of justice to yield themselves up in matters of right to mere conjectures and possibilities; and least of all do Courts of Admiralty, in cases of salvage, yield themselves to imaginations of this sort. Salvors are not to be driven out of Court upon the suggestion, that if they had not touched a derelict ship and cargo, the latter might in some

possible way have been saved from all calamity, and therefore that the salvors have little or no merit. Such a suggestion has not, in this case, been put forth by those, who alone would seem to be entitled to propound it; I mean the owners of the Ewbank and cargo. And least of all can it be maintained in behalf of the Padang; for, whatever may be the demerits or deficiencies of the salvage service rendered by the crew of the Hope, they were the direct means, by which the Padang has been enabled to earn any salvage. If the crew of the Hope had had more skill, and more energy, and more success in their perilous adventure, there would have been no need of calling for the assistance of the Padang. And, in every possible view of the case, the boldest imagination would not venture to declare, that if the Ewbank had not been taken possession of and navigated by the crew of the Hope, she would ever have fallen in with the Padang. The fact is, that the former brought her into contact with the Padang, and were the immediate instruments of enabling the latter to continue a possession, thus far safely maintained. It would be (I confess) a new doctrine to me, that, if salvors themselves fall into a state of distress, they can obtain effectual relief only by a surrender of all their own title to salvage; that, if they were to navigate a salvage ship across the Atlantic or Pacific, and they should afterwards be incapable of proceeding farther without some substantial assistance, that assistance can be purchased only at the peril of a loss of all their antecedent services. That doctrine is not, I am aware, contended for in the present case; but I do not well see, how the reasoning can stop short of it, if followed out to its natural consequences. It is said, that the Ewbank had made no advances in her intended voyage while in possession of the crew of the Hope, and, indeed, that she had actually lost six or seven degrees of longitude, and was thus receding from

her intended port. But this is no answer to the claim of salvage. If the salvors had accomplished the enterprise by getting safely into any other port, their title to salvage would have been equally indisputable; and so long as they held to their possession, or, if we may so say, so long as they clung to the wreck, it was not for others, whatever might be the want of skill or want of success of their efforts, to insist, that they were entitled to supersede the first claimants. They might refuse to lend assistance, however reprehensible such conduct might be; but they could not make it a condition of such assistance, that the original salvage service should be abandoned, or be treated as extinguished. Even if there had been an express contract to such an effect, it would have been deemed by any court in Christendom a fraudulent advantage taken of the necessities of the first salvors, and utterly void, upon the eternal principles of justice, humanity, and good faith. It would be like bargaining with a man for the purchase of his estate, while he is on a plank to save himself from shipwreck. In every view of the case, there is no possible ground, upon which the original merit of the salvage service of the Hope can be taken away or contested by those, who are merely called in to aid in, and ensure, its ultimate accomplishment. The question in such cases is not, whether the original salvors shall share; but in what proportions they shall share.

Then let us turn to the other point. Has there in the present case been any absolute, voluntary abandonment of the Ewbank and cargo by the crew of the Hope? I agree, that, if there has been, then the Hope cannot now entitle herself to share in the salvage. The doctrine stated at the bar, is perfectly correct, that salvage must be earned, not by attempting merely to rescue, but by the actual rescue of the property from its perils. The property must be effectually

saved. It must be brought into some port of safety; and it must be there in a state capable of being restored to the owner, before the service can be deemed completed. All the service done before that time is merely *in fieri*. Whatever of personal gallantry, or of laborious exertion, or of severe sacrifices, may have been already borne, it comes to nothing, unless the property is actually saved by the asserted salvors. But if saved, it is wholly immaterial, whether the salvage is by the original salvors alone, or by them with the aid of others; for the original salvors in such cases are treated as the principals; and the whole salvage service takes effect as their act, according to the maxim, *Qui facit per alium, facit per se.*

Was there, then, in the present case a voluntary abandonment of the Ewbank and cargo by the crew of the Hope? In point of fact there never was. There might have been intention, design, and wishes. The discouragements brought upon the crew by past events and past ill success may have rendered all of them entirely ready and willing to be rid of the burden of all future possession, and thus to bury all their hopes of profit, as well as fears of disaster. But I cannot say, that I clearly see that such intention, design, or wishes did exist to the extent, to which the argument has been pressed. On the contrary, I am not satisfied, that there ever was a single moment when, if effectual aid and assistance should be promised, and given by the Padang, and a new rudder could be hung, the mate and crew of the Hope, or at least a great part of them, were not willing to continue the original enterprise. The whole negotiation seems to me to have been exactly what, under existing circumstances, would naturally occur; a negotiation to obtain effectual aid and assistance to navigate the Ewbank into port; and if that could not be obtained, an intent to abandon the Ewbank *ex necessitate*. And

here let me add, that if Captain Brewster had refused to afford such aid and assistance, unless the crew of the Hope should abandon the salvage ship; and had made this the sure mode of operating upon their hopes and fears, until they had yielded her up, I should not have had the slightest doubt, that it would have been the duty of this Court to have declared such an abandonment, so procured, to be utterly void, as unconscionable and inhuman. And I should have felt myself called upon to visit Captain Brewster with the punishment due to such misconduct, by a forfeiture of his own share in the salvage. But here no such negotiation is pretended, or proved. Whatever may have been the intermediate designs or wishes of the parties, there never was any actual abandonment *de facto* and *de jure* by the crew of the Hope. They never wholly abandoned the Ewbank, *animo non revertendi.* The exclusive possession was never surrendered in fact, or in law, by any final acts, to the Padang; and all the intermediate proceedings are to be deemed but preliminary negotiations or propositions. *Finis coronat opus.* The case must take its true complexion and character from the final event. The navigation of the Ewbank into Boston was accomplished without any open visible dispossession of the original command of the crew of the Hope. The mate, Metcalf, remained on board with a part of the original crew; and an exchange was made of others for a more efficient number of the Padang's crew. Under such circumstances it is impossible, in contemplation of law, or of the true posture of the facts, to treat the case, as a case of an entire abandonment of the original enterprise, and the commencement of an entirely new one. It was nothing more than taking a new point of departure in furtherance of the old enterprise. Nor was it, in point of law, competent for Metcalf and his crew to abandon the old enterprise in behalf of the Hope, and to engage in a new enterprise of

salvage exclusively for themselves. And it was equally incompetent for the officers and crew of the Padang to enter into such an engagement with a knowledge of the facts. It would have been a meditated fraud upon the rights of the other parties. A salvage crew cannot, by any shuffling or management, deprive the owners of their right to share in the salvage. They must take or lose in common with the latter. The original character adheres to them through every change; and, having assumed the character of agents, they cannot make use of their agency powers to become exclusive principals. The trust travels with them on the voyage; and is severed only by that common necessity, which overwhelms and buries the entire enterprise. But here, in point of fact, no such abandonment, legal or illegal, intentional or formal, is made out. And nothing but the strongest evidence could establish it; evidence beyond the reach of all suspicion from interest, from management, from imposition, and from private and irresponsible conduct. I follow the admitted facts; and they speak a language as unequivocal, as could be desired.

The case of *The Jonge Bastiaan* (5 Rob. R. 322) before Lord *Stowell* (a name always to be mentioned with reverence) was a much stronger case to justify the defence of an abandonment. There, a ship had struck on a rock near Harwich, had lost her rudder, and beat in her bottom; had been deserted by her crew, and was warped off by a smack with great danger and peril. Afterwards the ship sunk from the damage received; but was weighed up and brought into Harwich by six other smacks by great exertions, continued through five weeks, the original salvors not assisting at all. The objection was taken, that their conduct amounted to an abandonment of all claim to salvage. Lord *Stowell*, in answer to the objection, said: "She sunk afterwards, it is true; but it is not on that account to be said, that the first salvors had lost

her again, or that they had abandoned their interest in her. They did not stay by the vessel; but it cannot be supposed, that, having risked so much for her recovery, they meant to desert her, whilst others were employed in their sight in weighing her up, and in saving the cargo. If they took no part in those exertions, it could only be, because they perceived, that the persons employed in the service would perform it as well without them. They had been the immediate instruments of saving her from her original danger, and of bringing her to the place, where these other parties were enabled to complete her recovery." Language more exact or expressive could not well be found; and it applies with tenfold more force to the circumstances of the present case, than to those of the case before him.

Much stress has been laid on the ascertainment of the point, whether Wheelwright or Metcalf was in the command after the Ewbank parted from the Padang, on the voyage to Boston. I do not attach any considerable importance to this fact, let it be decided whichever way it may be. Metcalf, being originally placed in the command by the master and owner of the Hope, must, in contemplation of law, be deemed to be the commander *de jure* during the whole voyage. No person had any legal right to displace him, while he remained on board. And if he consented to act under another person, it must be deemed to be a mere voluntary obedience, binding on him personally, but not necessarily on the owners of the Hope. The evidence in the case, however, leaves the point quite equivocal. And I rather incline to the belief, that in fact both Wheelwright and Metcalf exercised command on board in the character of equals, without either of them yielding any acknowledged superiority to the other. But this, in my view, s quite immaterial; for no one can doubt, that Wheelwright was the real *dux facti*, the strong, prevailing,

skilful mind, that led throughout the voyage. Metcalf appears from the evidence to have been a man not of very high character, occasionally at least given to intemperance, and somewhat deficient in energy and skill. On the other hand, it is but a moderate tribute to Wheelwright to say, that every line of the testimony proves him to be an accomplished seaman, of uncommon skill, and energy, and spirit. I have no private doubt, that he conducted in fact, whatever he might in form, the great operations of the voyage. It was the common case of the dominion of the strong over the weak or inefficient.

The grounds, then, upon which an attempt is made to exclude the Hope from any share in the salvage, wholly fail, treated as matter of law, or as matter of fact. And the remaining question on this head is, in what proportion the Hope is entitled to share in the salvage. The District Court gave two fifths to the Hope, and three fifths to the Padang. Both parties are dissatisfied with this allowance. It is insisted, on behalf of the Hope, that she is entitled to one half, bringing the whole into what is called, in the homely language of the common law, *hotchpot*, and what is called, in the more refined language of Rome, with more classical propriety, *collation*. Lord *Stowell*, in the case already cited of *The Jonge Bastiaan*, (5 Rob. R. 322,) brought the whole property into *hotchpot*, and gave an equal share to each of the salvor-smacks. It appears to me, that his judgment in that particular case was perfectly correct and unexceptionable. But he did not affect to lay down a rule to govern all cases. Cases may easily be suggested, in which, from the inequality of the labors, and perils, and nature and extent of the services of the co-salvors, equality would not be equity; though I think, that, as a general rule for ordinary cases, the rule of equality has much to commend it by its simplicity and conven-

ience of application. It has a strong tendency to diminish the causes of litigation; and to suppress that spirit among the parties, so notably and pertinaciously displayed in the evidence in the present case; I mean, the desire to found a claim of exclusive merit upon the studied disparagement of all other persons. If the District Judge had followed the rule in the present instance, I should have felt great repugnance in altering it. But I confess myself better satisfied with the actual proportions selected by him. The apportionment is more exactly in regard to relative merit, and relative perils, and relative risk of property, than a division into moieties would have been. On the side of the Hope, it may be truly said, that there was more of peril, and hardship, and suffering, with little skill and energy, and an entire want of success. On the part of the Padang, there was great skill, energy, and success, prompt assistance, and ready co-operation, but little peril or suffering. The relative services of the vessels, the Padang and the Hope, are very nearly in the proportions of the salvage.

It has been argued, that there was positive misconduct on the part of the salvors of the Hope, by withdrawing some part of the equipments and sails of the Ewbank, and by doing great injury to some of her cabin-work and decorations. We must not always scan things of this sort with nice and curious eyes. Much must be allowed to the nature of the marine service, and much to the infirmities of human nature, resulting from ignorance, and carelessness, and the spirit, not of wanton, but of unsparing abuse. This objection does not properly lie in the mouth of the co-salvors, but in that only of the owners of the property. It may justly diminish the aggregate amount of the whole salvage; but it can furnish no peculiar ground of merit in those, who become co-salvors in the actual state of things, and take it for better or for worse.

Now, it is not a little remarkable, that the owners of the saved property take no such objection. They are content with the actual state of things, imputing no blame, and seeking no redress. The case is wholly distinguishable from that of wanton plunderage and gross mischief, which might go to the forfeiture of the claim of salvage, or at least of a part thereof. But, even in such a case, it would only go to diminish the common stock of salvage in favor of the injured owner, and not transfer it to the co-salvors.

Nor do I think the distressed state of the Hope at the time, when she fell in with the Ewbank, can make any substantial difference in her merit; at least, not in respect to her co-salvors. She might have supplied her necessities, and been excused, and perhaps justified in so doing, from the abundance of the floating derelict ship; and then have left the latter to her fate. She did not stop there; but having supplied herself, undertook the not less grateful, though perilous task, of saving the residue for others. It would not, I imagine, much lessen the merit of saving a drowning man, that the salvor was an interested creditor.

Upon the whole, without entering more at large into this part of the case, I am well satisfied with the decision of the District Court in apportioning the salvage between the Hope and the Padang, according to the proportions of two fifths, and three fifths. But this apportionment only applies to the proportions, in which the owners, officers, and crews of the respective vessels, which were ultimately engaged in the salvage service, should share, relatively to each other; and cannot be permitted to affect the rights of the actual salvors belonging to either vessel. The claims of the latter not only admit, but absolutely require an independent consideration.

We are next led to the consideration of the question, what proportion of the salvage ought to be decreed to the owners

of the Hope and Padang, as contradistinguised from the officers and crews of those vessels. The District Court decreed a moiety; and the appeals actually interposed, though not professedly dealing with the distribution of the Hope's share, do (as I think) necessarily bring the whole subject before this Court for review and reconsideration.

And here it seems important, if practicable, to search for some general rule; and, if none can be found, to establish one for ordinary cases, as the point must constantly present itself in almost every case of salvage. There have been no peculiar services, no uncommon sacrifices, and no extraordinary perils encountered by the salvor ships, while engaged in the salvage service in this case, and no very large amount of property was put at risk. Neither of the salvor ships broke up or discontinued her voyage; neither of them has suffered any loss or injury in tackle, apparel, keel, or cargo; neither of them was exposed thereby to extraordinary difficulties, or has had any hair-breadth escapes from imminent dangers. The owners of the Padang knew nothing, and said nothing. The owner of the Hope was present; but did no more than yield a ready assent to what was done, having no personal hazard, and assuming no extraordinary responsibility. The case, therefore, stands upon merits common to all cases of this sort, and must be decided upon general principles.

The owners, then, have a just claim to share in the salvage in all cases, where their property is put at risk, in effecting the salvage service. I entirely agree with my lamented brother, the late Mr. Justice *Washington*, in declaring, that no stoppage on the high seas for the purpose of saving life is, or can be, deemed a deviation from the voyage, so as to discharge the insurance on ship or cargo.[1] The duties of hu-

[1] *Bond* v. *The Cora*, 2 Wash. Cir. C. R. 80.

manity call upon every human being to do such acts of mercy and charity; and that duty is enforced by all the authoritative precepts of Christianity, which no one is at liberty to disregard. But I farther agree with him[1] in holding, that any farther stoppage for the purpose of saving property, is a deviation from the voyage, and discharges the underwriters. And in all cases of this sort, it is wholly immaterial, whether the owner stands his own underwriter, or the risk is borne by others at his expense. In either case his property encounters risks beyond those belonging to the ordinary prosecution of the voyage, and he is entitled to an indemnity. But the law does not stop short with a mere allowance to the owner of an adequate indemnity for the risk so taken. It has a more enlarged policy, and a higher aim. It looks to the common safety and interest of the whole commercial world in cases of this nature; and it bestows upon the owner a liberal bounty and reward, to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions, which should interdict his master from any salvage service. If a bare compensation for loss and risk were allowed, what motive could any owner have to suffer his voyage to be retarded; his just expectations of profit to be frustrated; his whole commercial arrangements to be suspended upon risks, which he could neither foresee, nor guard against by any common prudence? The law has a wise regard to considerations of this nature; and it offers, not a premium of indemnity only, but an ample reward, measured by an enlightened liberality and forecast. While I agree with Lord *Stowell*, that the master and crew are, in strict language, the only salvors; I cannot agree to the justice of his remark, "that the owners in general have no great claim; as to labor and danger, none;" and

[1] *Bond* v. *The Cora*, 2 Wash. Cir. C. R. 80.

"that they come in only upon the equitable consideration of the Court for damage or risk, which their property might have incurred."[1] This latter remark is not borne out by the subsequent practice of that eminent Judge; for he has been liberal in awarding salvage to the owners. I can, with far more satisfaction, unite in the opinion of Mr. Chief Justice *Marshall*, in speaking on this subject in the great case of *The Blaireau*,[2] where he says, "The proportion allowed to the owners of the Firm," (the saving ship,) "and her cargo, is not equal to the risk incurred; nor does it furnish an inducement to the owners of vessels to permit their captains to save those found in distress at sea, in any degree proportioned to the inducements offered to the captains and crews. The same policy ought to extend to all owners the same rewards for a service, which deserves to be encouraged; and it is surely no reward to a man, made his own insurer without his own consent, to return him very little more than the premium he had advanced." To this it may be added, that it furnishes a strong inducement to officers and seamen not to desert their own proper duty to their owner, and his interests for selfish purposes, by making them share only in subordination to, and in connexion with, those interests. If I had been called upon for the first time, to say, what under ordinary circumstances should constitute the proportion of the owner, I might have hesitated; but I incline to think, that it would have occurred to me, that one third would be a suitable proportion. But, if I had found that proportion to have been adopted in other cases, and to have become, in some sort, a habit in our Courts of Admiralty, my own judgment would have reposed upon it with an undoubting confidence. Now, upon looking into the cases, decided in the Superior Courts, exercising admi-

[1] *The San Bernardo*, 1 Rob. R. 178.

[2] 2 Cranch R. 269.

ralty jurisdiction, it appears to me, that it will be found to have been, if not throughout, at least to some extent, a habit of these Courts to award to the owner one third of the salvage. That amount has certainly been not unusual in our most commercial districts, and especially in New York and Pennsylvania.[1] My brother, Mr. Justice *Washington*, adopted it after grave examination in the case of *The Cora*, (2 Wash. Cir. C. R. 80, 87;) and I find, that it has prevailed more than any other rule in contested cases brought before the Courts of the Districts, in which he presided. But, what is of most powerful influence in this case, it was adopted by the Supreme Court in the case of *The Blaireau*, (2 Cranch R. 240, 269, 271,) after the fullest deliberation, and upon solemn argument. It seems to me, that that case ought to furnish a guide for all subordinate courts under common circumstances. I do not say, that the rule should be absolutely inflexible, and not yield to any extraordinary merits, or perils, or losses on the part of the owners. Cases may exist, in which it may be quite fit to allow the owner one half, as was done in several of the cases stated at the bar.[2] But all such cases must stand upon very peculiar and pressing circumstances. Such circumstances certainly did exist in the case of *The Cumberland*, decided by the District Court of Massachusetts in 1815. The salvage ship in that case actually broke up her voyage, and returned back to port, keeping company with the Cumberland through the whole period. And it was beyond doubt a perilous enterprise to all concerned. As to the case of *The Mary Ford*, (3 Dall. R. 188,) it furnishes no authority for a different

[1] See *The Brig Harmony*, 1 Peters Adm. R. 34, note. Ib. 43. *The Cora*, 2 Peters Adm. R. 361, 371.

[2] See *The Ship Cato*, 1 Peters Adm. R. 48, 69. *The San Bernardo*, 1 Rob. R. 178. *The Waterloo*, 2 Dodson R. 442.

course. In that case, the distribution was made in the District Court by the award of three persons, named by the parties, and appointed by the Court.[1] So that the distribution was made with the consent of the parties in interest, by way of amicable award, and can in no just respect be held to be the legal adjudication of the Court, acting upon its own judgment. And the case, as to this point, never came before the Supreme Court, the appeal being limited to the mere question, who was entitled to the residuum after the salvage was deducted. In *The Havre*, (1 Rob. R. 286,) Lord *Stowell* adopted the proportion of one third, in a case calling strongly for a high remuneration; for it appeared, that the salvor-ship (which was a whaler) had lost the chief object of her voyage by this service.

Upon the whole, with the greatest deference to the opinion of the learned Judge of the District Court, I have come to the conclusion, that the owners of the Hope and the Padang are not, under the circumstances of this case, entitled to more than one third of the salvage. In so deciding, I have the satisfaction to know, that I am supported by his own judgment in three late cases; I mean those of *The Boston*, *The Hudson*, and *The Friendship*, in which he adopted the same proportion.

In apportioning the remaining two thirds of the salvage, I have not the least hesitation in expressing my sense of the merit of Wheelwright's services, as being in the very first rank. The only drawback, which there seems to be to his full measure of praise, is found in his conduct after his arrival in port, in setting up an exclusive claim for himself and his co-libellants, as the sole salvors; and in excluding their fellow-laborer, Metcalf, from all share in the salvage. There is

[1] See the opinion of Judge *Lowell*, 3 Dall. R. 191.

manifest error in this; which I am not disposed to impute to any wanton disregard of the claims of others, but to a precipitate and rash judgment, acting at the moment upon warm feelings, and the belief of imaginary wrongs, and the natural delusions of self-interest.

In making the apportionment between the master and the other officers, I find the usual course has been to allow the master a larger proportion than the mate, even when the latter has been put in command of the *salved* ship, as she is sometimes denominated by Lord *Stowell*. The common proportion has been, as I gather, under ordinary circumstances, double that of the mate. And it should be so; for the master, by his conduct in permitting the salvage enterprise, takes upon himself a great responsibility to his owners; and no common share of responsibility also to the shippers of the cargo. The same enlightened policy governs here, as in other cases. The reward is liberal, to stimulate the master to assume the responsibility, as the common guardian of the interests of all concerned. But here, again, the rule is not inflexible. It yields to circumstances of a peculiar nature; and in a case of great perils, sacrifices, and hardships on the part of the commander of the actual salvors, his proportion is permitted to approach nearer to that of the master. In the present case, I feel myself compelled to make a slight deviation from the rule, though I do it with extreme reluctance, on account of the singular conflict of claims between the two classes of salvors, and the relative merits of Wheelwright and Metcalf, standing, as they do, in the same official character, and yet somewhat distinguishable in the order and value of their services.

After bestowing upon the subject considerable reflection, I have come to the conclusion, satisfactory at least to my own mind, that the distribution should be according to the following scheme.

In the first place, I shall decree one third of the moiety of the net proceeds, decreed as salvage, to the owners of the Hope and Padang, in the proportions already intimated, of two fifth parts to the owner of the Hope, and three fifth parts to the owners of the Padang.

In the next place, I propose to divide the remaining two thirds of the moiety into fifty-seven shares, to be distributed among the several officers and crews of the salvor ships according to the following classification.

1. The first class includes the master and officers of the Hope and Padang.

Capt. Brewster is to take	nine	shares,		9
Capt. Lister	"	six	"	6
Mr. Wheelwright	"	five	"	5
Mr. Metcalf	"	four	"	4
Mr. Weissell	"	three	"	3

2. The second class includes all those persons belonging to the Hope, who were placed on board the Ewbank, and composed a part of her crew during the whole voyage. To each of these there are to be assigned two shares, namely:

To Watkins,	2	
Grace,	2	
Marshall,	2	
Duggin,	2	
		8

3. In the third class I place Turner, who was excluded from serving on board of the Ewbank contrary to his wishes, and to whom there are to be assigned two shares. 2 2

4. The fourth class includes the seamen of the Padang, who navigated the Ewbank into port, and to each of these I assign one share and a half, namely:

To Eldridge,	1½	
Hilyer,	1½	
Betts,	1½	
		4½

And I assign a like proportion to Hough, the carpenter, for his meritorious services, and the peculiar circumstances under which he went on board of the Padang; having been very efficient, as one of the original salving crew, namely: 1½ 1½

5. The next class includes those of the crew of the Padang, who remained on board of her. To each of these there is assigned one share, namely:

To Miller,	1	
Hatch,	1	
Dale,	1	
Barrett,	1	
		4

6. The next class includes those of the original salving crew of the Hope, who left the Ewbank, and went on board the Padang. To each of these there is assigned one share, namely:

To James,	1	
Lyman,	1	
Cornish,	1	
Smith,	1	
		4

7. The next and last class includes the crew of the Hope who remained on board of her. To each of them (in all nine in number) there are assigned two thirds of one share, namely:

To Walker,	⅔	
Oliphant,	⅔	
Addison,	⅔	
Graves,	⅔	

The Ship Henry Ewbank and Cargo.

Jones,	$\frac{2}{3}$
Lord,	$\frac{2}{3}$
Milburn,	$\frac{2}{3}$
Love,	$\frac{2}{3}$
Skinner,	$\frac{2}{3}$
	$\frac{18}{3}$ = 6 shares 6
	shares 57

It will be perceived, from the manner, in which I have viewed the general merits of the cause, that it has been wholly unnecessary for me to enter upon a minute examination of the great mass of conflicting testimony, as to the comparative merits or demerits of individual salvors. That there is much in this testimony, which is utterly irreconcilable, must be admitted; and on that account I rejoice, that it has not become my duty on this occasion to weigh in minute scales the credibility of those portions of it, which present the most distressing conflicts. All the testimony comes from parties in interest; and therefore partakes of the common infirmities of prejudice, suspicion, and feeling, which belong to evidence originating in such sources. Salvage cases constitute one of the class of excepted cases from the ordinary rule of evidence, by which a party is not permitted to testify in his own cause. But the exception arises from the very necessity of trusting to that, or of being left without proof; for in many cases no other persons exist, who can testify to the facts. A mere formal release would not in substance vary the legal credibility of such testimony, whatever it might do as to its competency. Salvors, then, are *ex necessitate* admitted as witnesses to all facts, which are deemed peculiarly or exclusively within their knowledge. To other facts they are incompetent. But the very necessity of such a resort creates in many cases, from rival interests, and jealousies, and

passions, a sad discoloration of the facts. In the struggle for victory, amidst the dust and eagerness of the race, each becomes intent for himself, and indifferent to others. So that the unwelcome duty is often imposed upon the Court, to trust little to individual statements of minute facts, and much to the general aspect of the facts, as gathered from the *res gestæ*. In salvage cases, above all others, it becomes the duty of the Court to place its decrees far more upon the general merits of all, than upon the professed merits of a few. There is also sound policy in it; inasmuch as it has some tendency to mitigate the unavoidable virulence of personal comparisons; and to bring into common bonds of peace and union those, who would otherwise join in the common adventure with a warm and generous gallantry, and then quarrel *ad internecionem* about the division of the booty. But, although I have not found myself called upon to comment at large upon the conflict in the evidence, I can bear the most ready testimony, that it has been examined by the counsel on all sides with a diligence and ability worthy of the highest praise.

It remains for me only to say a few words upon the subject of costs. And, I think, taking into consideration, how much of the evidence bears solely upon the merits of the particular salvors, without any reference to the general amount of salvage, that it would not be correct to make the costs and expenses in the District Court an equal charge upon the whole proceeds of the Ewbank and cargo, the effect of which would be to make the owners of them pay a full moiety. It appears to me, that it will be more just to charge the moiety given to the salvors with three fifths of those costs and expenses, and to charge the remaining two fifths on the other moiety. The costs of all the parties salvors in this Court are to be deemed exclusively a charge upon the moiety awarded to the salvors. The claimants, (the Charleston Fire and

Marine Insurance Company,) are entitled to their costs in this Court, the decree of the District Court not having been varied as to them. These costs are of course to be a charge upon the moiety awarded to the salvors.

I have thus gone over all the grounds of this cause, and I conclude by remarking, that I shall refer it to the Clerk to ascertain and report the amount of salvage due to each party, according to the principles of this decree, after deducting all the costs, charges, and expenses.

Blair and *Aylwin* for Manners and others; *C. G. Loring* and *William H. Gardiner* for Wheelwright and others; *Fletcher* and *E. Hasket Derby* for Blaise Isserverdens and others, and for George Brewster, and for George Weissell; *Sewall* for George Turner; *Dunlap* and *Bulfinch* for the Henry Ewbank and Cargo.

Guy Catlin
v.
The Springfield Fire Insurance Company.

Among the conditions which were printed on the same sheet with a policy of insurance against fire, was one requiring, that "all persons insured, and sustaining loss or damage by fire, should forthwith give notice thereof to the Company, and as soon after as possible deliver in a *particular account of such loss or damage*, signed with their own hands, and verified with their oath or affirmation, and also, if required, by their books of account and other proper vouchers." *Held*, that the *particular account* required by the above condition is a particular account of the articles lost or damaged, and does not refer to the manner and cause of the loss.

In stating a loss, it is sufficient to show it to have been occasioned by a peril within the policy, without negativing the exceptions of losses from design, invasion, public enemies, riots, &c., which are properly matters of defence.

Conditions are to be construed strictly against those for whose benefit they are introduced, when they impose burdens on other parties.

The words in a policy against fire described the house, as "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and *privileged as such*." *Held*, that this is not a warranty, that the house should, during the continuance of the risk, be constantly occupied as a tavern; but that it is, at farthest,

a mere representation of the intention to occupy it as such, and a license or privilege granted by the underwriters, that it might be so occupied.

Where no objection was taken at the trial to the absence of evidence, which it might have been in the power of the party to supply, it is too late after the verdict to take it.

Where underwriters agree to make good any loss or damage "by fire originating in any cause, *except design in the insured*, invasion," &c., *held*, that the exception of losses by design admits all losses not by design; that, therefore, where the plaintiff negligently left the premises insured derelict, and intruders came and burnt them, without any co-operation or knowledge on the part of the plaintiff, it is a loss within the policy.

Legal design is imputable, where the consequences *naturally flow* from the act, and not merely follow it. They must be connected with it, as a *cause*, and not as an *occasion*.

ASSUMPSIT on a policy of insurance. Plea, the general issue.

By the policy in the present case, dated on the 30th of May, 1825, the defendants insured the plaintiff for the space of six years from that date, "against loss or damage by fire to the amount of nine hundred dollars, on a dwelling-house, barn, and shed, situate, &c. in the town of Burlington, (Vermont,) owned by Lemuel Hayden and Harvey Hobart, of Burlington aforesaid, at present occupied by one Joel Rodgers, as a dwelling-house; but to be occupied hereafter as a tavern, and *is privileged as such*. Said buildings are made of wood, and are mortgaged to the said Guy Catlin to secure the payment of his debt, against the said Hayden and Hobart, of $ 1,146·20, and are more particularly described in a survey, dated May 30th, 1825, containing proposals of the insured, by him subscribed. On the dwelling-house $ 750, on the shed $ 100, and on the barn $ 50." And by the terms of the policy, the defendants agreed "to make good unto the assured any loss or damage, not exceeding in amount the sum insured, which shall or may happen to the property insured *by fire originating in any cause, except design in the assured*, invasion, public enemies, riots, civil commotion, or military or

usurped power." And certain conditions and proposals annexed to the policy are agreed to be referred to, to explain the rights and obligations of the parties.

The conditions and proposals thus alluded to are printed on the same sheet with the policy. They contain, among other things, the classification of certain risks, and rates of premium therefor; and a statement of the classification of goods into those not hazardous, those hazardous, and those extra-hazardous. And among those whose trades and occupations are deemed hazardous, are enumerated tavern-keepers. Among the conditions one (the eighth) is, that "all persons insured, and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company, and as soon after as possible to deliver in *a particular account of such loss or damage*, signed with their own hands, and verified with their oath or affirmation, and also, if required, by their books of account and other proper vouchers;" and also to "procure a certificate under the hand of a magistrate, notary public, or clergyman, most contiguous to the place of fire, and not concerned in the loss, or related to the insured or sufferers, that they are acquainted with the character and circumstances of the person or persons insured; and do know and verily believe he, she, or they really and by misfortune, *and without fraud or evil practice*, hath or have sustained by such fire loss and damage to the amount therein mentioned. And until such proofs, declarations, and certificates are produced, the loss shall not be deemed payable; also, if there be *any fraud* or false swearing, the claimant shall forfeit all claim by virtue of this policy."

The dwelling-house so insured was burnt down and totally destroyed on the evening of the 22d of February, 1830; and, on the 24th of the same month, the plaintiff addressed a letter to the defendants, informing them of the loss, which

was duly received. The letter stated, that "the house was burned on the evening of the 22d instant, and totally destroyed." And it also contained a declaration, that the plaintiff had no other insurance, and had "sustained a loss full equal to the amount insured on the house. The shed and barn were not destroyed." And the plaintiff at the bottom of the letter, took a solemn oath before a Justice of the Peace, "that the statements therein made were true."

The other preliminary proof of a certificate was furnished to the defendants, who declined paying the loss; and by a letter, dated on the 30th of March, 1830, in reply to that of the plaintiff, stated as a reason, that "the building was insured to be occupied. When burnt it had been a long time vacant, often deserted, derelict; and was destroyed by foul means. Had the house been occupied, as when insured, it is very clear the loss could not have occurred from the cause which destroyed it." No objection whatever was stated to the preliminary proofs of loss. At the trial the plaintiff had a verdict for $ 604·83.

C. G. Loring and *Fay* for the defendants, now moved for a new trial, which was opposed by *Fletcher* for the plaintiff. The grounds are fully stated in the opinion of the Court.

Story J. A motion has been made and argued for a new trial upon various grounds. In the first place, that the Court instructed the Jury, that the letter of the plaintiff to the defendants, giving notice of the loss, was a sufficient compliance with the eighth condition above stated, requiring "a particular account of the loss or damage." The argument is, that the particular account here referred to should contain not only a statement of the amount of the loss, but of the manner and cause of the loss, verified by the oath of the party, so that it should appear, that it did not fall within any of the exceptions of the policy. But it seems to me very

clear, that this is not the true interpretation or object of the clause. If we look at the policy, it will be seen, that the Insurance Company contemplate not only insurance upon houses, but upon goods and machinery. In cases of insurance upon goods, and in partial losses of all sorts, the particulars of the nature, quality, and quantity of the goods, and of the damage or loss sustained, are most important to enable the Company to decide on, and ascertain the damage or loss; and as these particulars are generally and almost exclusively within the knowledge of the assured, his oath or affirmation thereto is required as preliminary proof. The underwriters rely on, and address the interrogatory to his conscience. But it surely could not have been expected, that the assured should in all cases swear, as to the mode and cause of the loss; for in many cases it would be impossible for him so to do, from the want of due knowledge or means of knowledge. He might know the fact of the loss by fire; but as to the precise mode, in which the fire was kindled, he might be and ordinarily would be wholly ignorant. Surely, it could not have been required, that any person should swear to facts or causes of loss, which he could not know; and thus put his conscience in jeopardy, or lose his insurance, although the whole was a case of sheer misfortune, without the slightest suspicion of fraud.

But, if we examine the context, it seems to me, that every doubt must vanish; for it may be truly said, in such a case, *Noscitur a sociis.* The "particular account" is to be verified by the oath or affirmation of the assured, and "also, if required, by their books of account, and other proper vouchers." Now, this is all very natural, if the meaning be, as the Court suppose it to be, a particular account of the articles lost or damaged; but it is wholly without meaning, if applied to the mode or cause of the loss or damage. No per-

son could suppose, that the books of account of the party, or other proper vouchers, could or would furnish the slightest proof of such facts. And yet the argument is just as strong, applied to the case of such books and vouchers, as it is to the requisites of the oath or affirmation; for in each case they are required *ad idem*. And I cannot but think, that the Company understood this clause, as the Court does. For in their reply they placed their defence upon an entirely different ground, not suggesting this, as in all fairness they ought, if they meant to insist upon it.

And then, again, as has been well observed at the bar, the oath of the party is not required, as an expurgatory oath, negativing fraud or design on the part of the assured. For these reliance is positively placed upon a more disinterested source, upon the certificate of some magistrate, notary, or clergyman, that the loss was real, and by misfortune, and without fraud or evil practice. As to negativing by oath the exceptions in the policy, it is nowhere required by any express stipulation in the conditions; nor can it be inferred from any reasonable presumption of intent. It is true, that it is said, that "if there be any fraud or false swearing, (in the alternative,) the claimant shall forfeit all claim by virtue of this policy." But this is mere matter of defence by the Company, and constitutes no part of the preliminary proofs of the plaintiff. And, as to the exceptions of losses from design, invasion, public enemies, riots, &c., they constitute matter of defence, and are referrible to the trial, and are not to be negatived on oath in the preliminary proofs; because the plaintiff must at the trial prove a case *primâ facie* not within them. It might as well be contended, that the plaintiff was bound to state under oath every other fact, upon which his recovery should depend. The true answer to all these suggestions is, that the stipulation is not in the contract; and no

Court is authorized to add a single term to conditions in their own nature sufficiently onerous. Conditions are to be construed strictly against those, for whose benefit they are reserved, when they impose burdens on other parties. The language of the clause is, that the party is to "deliver a particular account of such loss or damage," in the alternative. He is to state an account of the loss, that is, of the thing or value lost; or of the damage, that is, of the amount of the injury sustained. But he is not required to state, how the loss happened, or the cause or occasion of it.

It is also said, that the notice and statement of the loss must show it to be a loss within the risk of the policy; and that it is always so done in marine policies. Certainly, the loss must be shown by the notice to be by a risk within the policy; and it is so shown here, for the loss is stated to be by *fire*. But in the notice of a loss under a marine policy, no one ever supposed, that it was necessary to state more than a loss by a peril insured against. Must the plaintiff go on, and negative all exceptions, express or implied by law, which constitute the defence of the other side? Must he state, that a loss by perils of the seas has been without any fraud, negligence, deviation, or non-compliance with warranties? Practically speaking, I have entire confidence, that allegations of this sort have never hitherto been deemed essential or pertinent.

The next objection is, that the Court instructed the Jury, that the words in the policy, "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and privileged as such," did not import on the part of the plaintiff a warranty, that they should be so occupied during the continuance of the risk. What the Court did say to the Jury on this point was, that these words did not constitute a warranty, that the house should during the continuance of

the risk be constantly occupied as a tavern; but that the language was, at farthest, a mere representation of the intention to occupy it as a tavern, and to secure for it the privileges of the policy as such. And I am, upon farther reflection, clearly of opinion, that the direction was right. We must interpret these instruments in a reasonable manner, from the nature and objects of the parties. Here the assured was the mortgagee of the house; and he is so described in the policy. In the ordinary course of things, he could not be presumed, as mortgagee, to intend to take possession of the property and occupy it as a tavern; and of course, if occupied as a tavern, it must be by or under the mortgagers. In point of fact, as the survey, made by the Company's own agent, and on which the policy itself was underwritten, states, it "was to be occupied, in the course of two or three days by the said Hayden and Hobart for the purpose of keeping a tavern." In the mouth of the mortgagee, then, if the language were to be treated as his, it could fairly be understood to import no more than a representation, that it was to be occupied as a tavern. And if so, then, as taverns are enumerated in the conditions of the Company as among the *hazardous* risks, for which an extra premium is to be paid, it would follow, that the policy would be void for a fraudulent concealment, unless the fact were disclosed, and the house privileged as a tavern. But the language cannot in strictness be treated as the language of the mortgagee. It occurs in an instrument executed by the Company, and purporting therefore to contain their engagement. It occurs in the descriptive part of that instrument. Of the property insured, the Company say, that they insure the house now occupied "as a dwelling-house, and to be hereafter occupied as a tavern, and privileged as such." Privileged by whom? clearly by the Company, — to be used as a tavern. The Company agree to take this

hazardous risk, and permit the policy to attach, notwithstanding the house may be changed from a common dwelling-house to a tavern. They could have no motive for insisting, that the house should always be, as it is classed by the survey, in the sixth class of hazards. If it had continued to be occupied as a common dwelling-house, the risk would have been far less, while the premium would have remained the same. It was not, then, a warranty of the assured, that it should be at all times during the risk occupied as a tavern; but a license or privilege granted by the Company, that it might be so occupied. The case is entirely different from that of a policy on a vessel to be engaged in the whale fisheries; for there the nature of the voyage ascertains and limits the language of the policy. Unless the vessel sails on a whaling voyage the policy does not attach; and, if she engages during the voyage in other traffic, it is a deviation from the voyage. But, suppose a policy were on a coasting vessel generally for a twelvemonth, with liberty to engage in the whale fisheries; would that amount to a warranty, and tie up the policy to an employment solely in that trade? Or, suppose a policy on a vessel from Boston to Leghorn, and back, with the privilege of cruising as a letter of marque; would that amount to a warranty, that she should so cruise? Certainly not in either case. The construction would be, not that the words restrained, but that they enlarged the general words of the policy. Let me put another case. Suppose a policy against fire, underwritten on the house of A in Boston, described as a dwelling-house, or as occupied as a dwelling-house; would the policy be void, if the house should cease for a time to have a tenant? Such a doctrine has never to my knowledge been asserted; nor should I deem it maintainable.

The interpretation put by the Court upon the words of the policy, "privileged as such," seems now admitted by the

Counsel for the defendants to be the true one, although at the trial it was contended, that the meaning was, that the house was licensed by the municipal authorities, as a tavern; and it constituted one of the grounds in support of the motion for a new trial. That point is now abandoned.

Another objection is, that there was no evidence, that there ever was any intention to occupy the house as a tavern. It may have been so; but no objection was then taken to the absence of such evidence; and it is quite too late after a verdict to take it, when the deficiency might have been within the power of the party to supply. But in fact, if the ground of defence was misrepresentation, the *onus probandi* was on the defendants. The plaintiff was not bound to prove the representation, if any was made, to be true; but the defendants were to show, that it was false, and false in a point material to the risk.

The last objection is to a supposed instruction of the Court on the point, what constitutes a loss by design within the meaning of the policy. I state it in this form, because the written motion does not accurately present the instruction of the Court, or the language of the Court, although it doubtless intended so to do. The line of argument in the defence at the trial did not impute to the plaintiff any direct or positive co-operation in the actual setting fire to the house, or any knowledge or connexion with the parties, who did it. But it was to this effect, that if the plaintiff, by his negligence, and by leaving the house derelict, thereby exposed it to such destruction by mere trespassers, and was not unwilling, that it should be so destroyed, that such negligence and laches avoided the policy, and constituted a loss by design within the meaning of the policy. The Court in commenting on this part of the case, said, that the case was as clear, and lay in as narrow a compass on this point, as any which had ever

come before it. The language of the policy is, that the Company will make good any loss or damage "by fire, originating in any cause, except design in the assured, invasion," &c. So that the Company make themselves liable for losses by negligence, as well as by accident; for the exception of losses by design admits all losses not by design. I do not say, that the defendants would be liable for every loss occasioned by the gross personal negligence of the plaintiff; for it might under circumstances amount to a fraudulent loss. But the English decisions clearly are, that, on policies against fire generally, losses by the negligence of tenants are within the risks taken. And it is still more clear, that losses by the negligence of tenants, or by the criminal wantonness, or misconduct of mere trespassers, or intruders, or felons are within the common policies against fire. But in the present policy there is no room for doubt on this point. The losses excepted are, not losses by design generally, but "losses by design of the assured." The case, then, is reduced to the consideration of what constitutes a loss by design in the assured, within the meaning of the policy. I say, that it is not a loss by the mere negligence or laches of the party, where he has left the property exposed to the peril, but has not cooperated directly or indirectly with those, who produced the loss. Design imports plan, scheme, intention, carried into effect. The loss, to be by design of the assured, in the sense of the policy, must be by incitement, connivance, or cooperation of the assured, directly or indirectly, with the persons, who were the agents in the act. It is not sufficient, that he is negligent in leaving the premises derelict, and thus exposing them to the wanton or criminal acts of intruders. Negligence is not design. We are here, as in other cases of insurance, to look, not to the remote cause, but to the proximate cause of the loss; *Causa proxima, non remota specta-*

tur. How can it be truly said, that the negligence of the plaintiff in this case was, in any just sense, the proximate cause of the loss, if he had no co-operation, knowledge, or part in the act? Unless, then, the Jury can from the evidence clearly see, that the plaintiff was, not merely negligent, but was directly or indirectly connected with the act, I am of opinion, that it cannot be correctly deemed to be a loss by design of the assured. The defendants do not themselves impute to the plaintiff active co-operation, or connexion with the persons, who set the house on fire. On the contrary the argument supposes, that it was set on fire by mere transgressors or felons, who were utter strangers to him, and of whose designs he was ignorant. It imputes to him only negligence, and wishes or motives for the event, and undue exposure to the perils.

Such was in substance the direction to the Jury. And now upon the farther argument, which has been had, I deliberately adhere to it. It appears to me, that the doctrine contended for in the defence is untenable and dangerous, and would take away all security under policies of this sort. It in reality attempts to engraft upon the words of the policy a new term, and to exempt the underwriters from all losses, which can be traced, however remotely, to the neglect or laches of the assured. If the latter were to leave open the front door of his house by night by gross negligence, and felons should enter and set it on fire, I do not perceive, how the loss upon the argument could be recoverable. It might then be said, as it is now said, that he had his motives, wishes, and expectations, though he was wholly ignorant of the design of the felons. I cannot but think, that under such circumstances policies of this sort would hold out false lights and false securities to the assured; and would seduce them into the false confidence, that design meant something widely different, and contradistinguished, from negligence.

Legal design, it is said, is to be imputed to a party, where the consequences naturally flow from the act. That is true; but then they must *naturally* flow from it, not merely follow it. They must be connected with it, as a cause, and not as an occasion. The act and the negligence must be knit together by an indissoluble bond. The law properly holds, that every man is presumed to intend, what are the natural consequences of his act. But it does not presume, that he intends every thing, which may possibly follow from his negligence, or be remotely occasioned thereby. The case of the squib, (*Scott* v. *Shepherd*, 2 W. Black R. 892,) stands upon the very verge of the law, upon a sort of metaphysical subtilty; and, whether rightly or wrongly decided, it was decided, not upon mere negligence, but upon a direct and positive act, which gave rise to an action of trespass, as a mediate, if not an immediate act of force. In *Percival* v. *Hickey* (18 John. R. 257) there was a direct and immediate act of force by running down the vessel of the party; and so the case of *Guille* v. *Swan* (19 John. R. 381) was treated by the Court.

But it is said, that the Court did not leave the question to the Jury, whether there was fraud on the part of the plaintiff, or such gross negligence, as was presumptive of fraud. No such ground is suggested in the written motion for a new trial; and of course it cannot, according to the rules of this Court, be now taken notice of. But I may say, that, if not put to the Jury, it was because the point was not distinctly put by the defence for the consideration of the Jury. The Court certainly is not to be expected to supply matters of defence, which the Counsel do not choose to insist upon at the trial.

Upon the whole, my judgment is, that the motion for a new trial ought to be overruled; and it is accordingly overruled.

CHARLES SHIRLEY, APPELLANT,

v.

JAMES TITUS, LIBELLANT.

No appeal lies by any party from a decree of the District Court, unless on his part the matter in dispute exceeds the sum or value of fifty dollars, under the Acts of Congress.

LIBEL *in personam* for seamen's wages. At the hearing in the District Court, there was a decree for the libellant for twenty-eight dollars, and costs, the original demand being over fifty dollars. The respondent appealed, but there was no cross appeal by the libellant.

Upon the opening of the appeal, these facts being stated,

STORY J. said: This Court has no jurisdiction in the case. The Acts of Congress[1] give no appeal from the District Court, except in cases where the matters in dispute, exclusive of costs, exceed the sum or value of fifty dollars. Here, there being no cross appeal by the libellant, the only matter in dispute is the twenty-eight dollars awarded by the District Court to the libellant. It would have been different, if there had been a cross appeal by the libellant, since he demanded more than fifty dollars by his libel.

Appeal dismissed.

B. Sumner for appellant.

C. G. Loring for appellee.

[1] Act of the 24th of September, 1789, ch. 20, § 21. Act of the 2d of March, 1803, ch. 93, § 2.

United States v. John Morrison and others.

Where the master directed one of his crew to be punished for gross misbehaviour, and the crew interposed and prevented the infliction of the punishment, compelling the master, by acts of violence and intimidation, to desist therefrom; *held*, to be an endeavour to commit a revolt within the Act of Congress of 1790, ch. 36, [9,] § 12.

Neither a previous deliberate combination for mutual aid and encouragement, nor any preconcerted plan is necessary to bring it within the Act.

Indictment for an endeavour to commit a revolt on board of the ship United States. Plea, not guilty.

At the trial the evidence was briefly as follows: On the 8th of August, 1833, Dutton, one of the crew, on account of his gross misconduct, was ordered by Webb, (the master of the ship,) to be put in irons. The mate attempted to do it, and Dutton made resistance. The mate, however, got Dutton down in the scuffle, and was proceeding to put on the irons. The crew then came aft together, some of them having handspikes in their hands, and others having chisels, knives, or mallets; and said, that the master should not put any man on board the vessel in irons. The master said he would; and they continued to say he should not. The prisoners at the bar were part of the crew, and present, and apparently co-operating with the others. The master then attempted to keep them off; and proceeded to tie Dutton's feet with a line. Murphy, (one of the prisoners,) cut the line from his feet. Morrison, (another of the prisoners,) who was at the helm, left it, and another person took it. Morrison then ran towards the master, and struck him. In the mean time the crew dragged Dutton away forward from the mate. And the master, finding the resistance general among the crew, thought it his duty to proceed no farther and made no more resistance to the rescue of Dutton.

Park, for the defendants, contended, that the evidence was not sufficient to establish any combination or concerted plan of the crew for mutual assistance in the interference or rescue; and that it was merely a sudden affray without combination or design. He cited 3 Washington Cir. C. R. 78; Id. 524.

Dunlap, District Attorney, contended, *e contrà*, that the evidence clearly established the offence charged in the indictment; and he cited *United States* v. *Hemmer*, 4 Mason R. 105; *United States* v. *Smith*, 1 Mason R. 147; *United States* v. *Haines*, 5 Mason R. 272.

STORY J., in summing up to the Jury, said: To constitute the offence of an endeavour to commit a revolt, in the sense of the Act of Congress of 1790, ch. 36, [9,] § 12, something more is necessary than bare disobedience or resistance by a seaman to the lawful authority, commands, or proceedings of the commanding officer of the ship. There must be a designed combination or co-operation with others in such disobedience or resistance; or some attempt or endeavour to procure it; or some assistance, aid, or encouragement to others in such disobedience or resistance. In short, there must be some effort to excite, or inveigle, or engage others in such illegal acts; or some aid or encouragement promised or given in furtherance of them. But it is by no means necessary, that there should be any previous deliberate combination for mutual aid and encouragement, or any preconcerted plan of operations to effect the illegal object. However sudden may be the occurrence, or unexpected the occasion, of such disobedience, or resistance, those, who take a part in it, whether by words or by deeds, by direct acts of aid or assistance, or by encouragement or incitement, are in contemplation of law guilty of the offence. Their conduct, under such circumstances, amounts to an endeavour to commit a revolt by over-

throwing, *pro hac vice*, the lawful authority of the commanding officer of the ship. Thus, to apply the doctrine to the present case, if the master of the ship should direct a seaman to be punished reasonably for his misconduct, and the crew should interfere to prevent the infliction of the punishment by attempting a rescue; or by other acts of violence; or by intimidation or threats; such acts would in contemplation of law amount to an endeavour to commit a revolt. They would operate directly to suspend the exercise of the lawful authority of the master on board of the ship. And those of the crew, who should stand by, exciting or encouraging those, who were actually engaged in such illegal interference, would be equally guilty with the immediate actors.

The only question, then, in the present case is, whether the facts bring the defendants, or any of them, within the reach of these principles. It appears from the evidence, that the master directed one of the seamen to be punished for gross misbehaviour. The crew interfered, and prevented the infliction of the punishment, and rescued the party. The master was ultimately compelled to relinquish his intention of punishment by the acts of violence, intimidation, and threats of the crew. All the defendants were present, and (as the witnesses say) co-operated in the interference and rescue. Such is the state of the evidence; and it is for the Jury to say, whether they believe it. If they do believe it, then the Court have no difficulty in saying, that in point of law the defendants are guilty of the offence charged in the indictment.

Verdict, guilty.

Alsop v. The Commercial Insurance Company.

A policy of insurance underwritten for $10,000 on profits on merchandise on board the Brig Leonora at and from Callao to Baltimore, free of average and salvage, and the policy to be the only proof of interest required, is not in our law to be deemed a wager policy, where the assured had property on board, and neither he nor the underwriters intended to insure upon a wager policy, but intended it as a policy on interest.

There cannot, strictly speaking, be a gaming policy under our law, unless both parties intend to game or wager.

If one party, intending a gaming or wager policy, procures it to be underwritten by the other, as a policy substantially on interest, and thus designedly misleads the latter, the policy is void for fraud.

But, if both parties intend a policy on interest, and the assured has a substantial interest in the property on board, and there is an over-valuation of the property made *bonâ fide*, and not with an intention to mislead or defraud the underwriter, the policy is good.

If an over-valuation of the property insured be made with an intent to defraud or mislead the underwriter, the policy is void. But if it be *bonâ fide* made, and without any intention to defraud or mislead the underwriter, and the party has a substantial interest, the policy is good. In the latter case, if the underwriter agrees to the valuation, he is estopped to go into the consideration of the actual value.

If a party insures property, expected to be on board a ship, to a large amount, upon a valued policy, and much less is in fact shipped, he is intitled to recover in case of a loss, a proportion *pro ratâ* only, notwithstanding the valuation.

In what cases the Court will interfere with a verdict upon matters of fact, and especially where fraud in fact is in issue, by granting a new trial.

A new trial will not be allowed merely to let in new cumulative evidence to points made at the trial.

An objection was taken to a direct interrogatory, and the answer to it, at the time of taking the deposition, which was supported by the Court at the trial, and the answer ruled out; *held*, that the answers to the cross interrogatories, which did not on their face purport to be asked in consequence of the direct interrogatory, and were not made dependent upon it, are admissible as evidence.

Action upon a policy of insurance, underwritten by the defendants, dated the 19th of August, 1831, whereby the plaintiff by his agent, Zebedee Cook, Jr., was insured "ten thousand dollars on profits on merchandise on board the Brig Leonora, at and from Callao to Baltimore, free of average and salvage, and the policy to be the only proof of interest required," at a

premium of one and a half per cent, the profits being valued at $20,000. There were shipped on board the Leonora at Callao, for the account of the plaintiff, bullion of the invoice value of $11,821, and California hides of the invoice value of $7,765. The Leonora is admitted to have sailed on the voyage and to have been lost by the perils of the seas, she never having been heard of since her departure from Callao. At the trial there was a verdict for the plaintiff for the whole amount insured.

A motion for a new trial was made for several reasons stated in a written application to the Court. Those that were finally insisted on will appear in the opinion of the Court.

Aylwin and *Webster* for the plaintiff; *Charles G. Loring* and *J. Mason* for the defendants.

Story J. This case has been argued upon a motion for a new trial, for reasons stated in the written application to the Court, upon which I have no more to observe, than that it is not to be taken for granted, that they present a full and accurate view of the whole case, or of the principles of law involved in the charge of the Court. They are to be taken merely as suggestions, which, according to the practice of this Court, Counsel are authorized to make for the purpose of bringing the matter in review before the Court. If there has been any material mistake in point of law, prejudicial to the defendants, they are entitled to a new trial to correct it. If, on the other hand, there has been a failure to try the cause upon its fair merits in point of fact, and there has been a clear miscarriage by the Jury, the same result will follow.

The first point now insisted upon for a new trial, (for several of those, which are stated in the written motion have been waived,) is, that the Court permitted certain parts of the deposition of Edwin Bartlett, which were objected to by the defendants, to be read in evidence to the Jury. In the direct

examination of Bartlett the plaintiff put the following interrogatory: "Did, or did not, the House of Alsop & Co., in the month of March, 1831, inform said Richard Alsop, that they intended to make shipments to him on account of those funds? If so, by what opportunity or vessel?" Upon an objection taken by the defendants to this interrogatory, and the answer to it, at the time of taking the deposition, and now insisted on, upon the ground, that the one asked, and the other stated the contents of written correspondence, which ought to have been produced, as the best evidence, the Court sustained the objection, and overruled the interrogatory and answer. In the cross examination the defendants put the following interrogatories: (1.) "What was the nature of the orders of Mr. Alsop to remit funds in your hands? Annex such orders, or state their contents." (2.) "Had the said Richard Alsop given any orders or instructions for the purchase and shipment of said hides? or were they purchased by the house to be sent to him in payment of the balance due him?" (3.) "Were any letters written by you, or any members of the firm of Alsop & Co., to Mr. Alsop concerning the proposed shipment by the Leonora? If yea, annex copies thereof, or state the contents, as accurately as possible." These cross interrogatories were fully answered by the witness; and the plaintiff proposed to read these answers to the Jury, to which the defendants objected, upon the ground, that they were asked *de bene esse* only, upon the supposition, that the direct interrogatory and answer might be ruled in as evidence by the Court. The Court overruled the objection, and admitted these answers in evidence. And this ruling now constitutes the material point of this exception of the defendants.

The argument now is, that the objection was well taken at the trial; that the defendants had a right to ask the questions conditionally; and that the answers could not be admis-

sible evidence against them, unless the objection to the direct interrogatory had been overruled. And it is urgently pressed, that otherwise the defendants would be put in peril, by being compelled to make an election at the time, when the deposition is taken, whether to rely upon their original objection, or to insist upon the cross interrogatories being answered.

This exception is confessedly new in its form and presentation. No authority is adduced in support of it; and it must, therefore, be decided upon principle. I have reflected much upon it, and am perfectly clear, that it has no solid foundation in the law of evidence, as administered in this country or in England.

In the first place, there can be no doubt, that generally the answers to cross interrogatories are admissible evidence in favor of the other side. If a party chooses to ask questions, and the answers are unfavorable to him, he cannot insist upon removing them out of the cause; and, if they are in his favor, insist upon them, as evidence. The law knows of no such principle of evidence; and it would, if adopted, be most pernicious in the administration of justice. There is no more reason, that the answer should be excluded, if asked upon the cross examination, than there would be to exclude it upon the direct examination. The plaintiff might with quite as much justice insist, that an answer to a direct interrogatory should not be evidence, because it was to meet some expected evidence on the other side, and happened to be unfavorable to him, as the defendants might insist, that the answers to their cross interrogatories should, under like circumstances, be suppressed. The law recognises no such principle. Each party asks all questions at his peril; and he must take the answers, if they respond to the question, for good or for evil. They are in the cause; and it is not for the party, who brought them there, to insist upon their incompetence.

But, in the present case, the foundation, on which the argument rests, does not sustain it. Suppose the direct interrogatory had been originally suppressed, and never answered; could there be a doubt, that the answers to the cross interrogatories would be good evidence, if these interrogatories had been retained in the cause? I think there could be no doubt in such a case, without disturbing the first elements of evidence. Now, in point of fact, the present cross interrogatories were never withdrawn, before the answers were given, or afterwards. They do not on their face purport to be asked in consequence of the direct interrogatory, or the answer to it. They have no reference whatever to that interrogatory or the answer. They are not in their form put *de bene esse*, or hypothetically. They are not (as they ought to have been, if intended to be so put,) drawn in a form, which would exclude them from the deposition, if the direct interrogatory should be suppressed. They are not, directly or by consequence, attached to or dependent upon it. On the contrary, they are independent, substantive interrogatories, which the defendants had a right to put, whether the direct interrogatory were in or out of the deposition. Suppose the answers had been favorable to the defendants, I should be glad to know, upon what plausible ground the Court could now exclude them. Could the Court have said; You probably intended to put these cross interrogatories, only because the plaintiff had asked the direct interrogatory; and as that is excluded, you shall not have the benefit of your cross examination? Certainly not. The defendants, not having in terms so limited the application of their interrogatories, and not having in terms made them dependent upon the direct interrogatory, could not have been shut out from the evidence of the answers elicited upon their cross examination. And if the defendants could not, how can the Court, consistently with any principle, shut them out from the plaintiff? If the answers

would be evidence for either party, they must be for both. The competency of the evidence depends upon its nature, and not upon the side, in whose favor it makes, after it is introduced. Judicially, it is impossible for me to say, that the defendants did ask these interrogatories solely on account of the direct interrogatory. They are perfectly pertinent to the cause, if that be struck out; and indeed, in my humble judgment, of just such a nature, as ought to have been asked, not *de bene esse*, but absolutely, to eviscerate the very truth upon a point important to the defence. But it is sufficient for me to say, that the cross interrogatories, not being in fact made in the record dependent upon the direct interrogatory, they stand, like all other cross interrogatories, upon the general principles of evidence. There is no peril or mischief to the party in this result. If he chooses, he may make his cross interrogatories dependent; and then, whether favorable or unfavorable, the answers follow the fate of the direct interrogatory. And I cannot but think, that a different decision in this case would exceedingly perplex and impair the due administration of justice. It would enable a party to ask all sorts of questions in a general shape, relative to any matters in any antecedent objectionable interrogatory, and then to use them as evidence, if in his favor; and if otherwise, to exclude them from the use of his adversary. It would compel the Court to search out the motives of all the cross interrogatories, and conjecture their object, instead of acting upon their terms and import. If a party by cross examination of an incompetent witness on the general merits, after his incompetency is known, makes him a good witness, *à fortiori* a party asking a competent witness a general independent question, makes him a witness to that point.[1]

[1] See *Corporation* v. *Sutton*, 1 Vern. R. 254. *The Charitable Corporation* v. *Sutton*, 2 Atk. R. 402, 403. *Jackson* v. *Van Slyck*, 2 Cain. R.

The next point is, that the Court instructed the Jury, that the representation made by the plaintiff to the defendants was sufficient to put them upon inquiry as to the time of the arrival of the Benezet, and that having other means to inform themselves, they were bound to make use of those means, if they thought the fact material; and that by omitting to do so, and underwriting the policy, they waived the right to receive information. Now, in order to understand the proper bearing of this exception, which does not fully and correctly state the charge of the Court, it will be necessary to state some of the facts and proceedings at the trial, and the charge of the Court upon this particular point. The policy was procured to be underwritten through the instrumentality of Mr. Cook, an insurance broker, who at the time of procuring it showed the underwriters a copy of his letter of instructions, and said he knew nothing more. It was in these words: "Zebedee Cook, Jr., Richard Alsop of Philadelphia. $10,000 on profits on merchandise on board the brig Leonora, (Weighmar master,) at and from Callao to Baltimore, free of average and salvage; and the policy, in the case of loss, to be the only proof of interest required. The Leonora sailed about the 12th of April, supposed direct for Baltimore. The ship Alfred sailed, ostensibly for New York direct, some days before the Leonora, and has not yet arrived. *The Benezet arrived at New Bedford, and sailed after the Leonora.* The Leonora is a small brig, and not old, — I believe not five years, — and is considered in excellent order." In point of fact, the Leonora sailed on the 15th of April, three days later than was here supposed; and the Benezet

178. But see *Moorhouse* v. *De Passou*, 19 Ves. R. 433, 434. *S. C.* Cooper R. 300. *Vaughan* v. *Worrall*, 2 Madd. Ch. R. 322. *Bland* v. *Archbishop of Armagh*, 3 Bro. Parl. Cas. 620.

arrived at New Bedford on the 15th of July, 1831; and her arrival was reported in the Boston Commercial Gazette, a newspaper taken at the Insurance Office, on the 18th of the same month, as follows: "Arrived at New Bedford, 15th, the brig Benezet, Sherman master, Callao, April 20th. Brig Leonora, &c., sailed about a week previous." Now, upon this posture of the facts, it was contended by the defendants, first, that there was a misrepresentation of a material fact, namely, the arrival of the Benezet, which was represented by the letter as having *recently* arrived, whereas she had been in port thirty-three days; secondly, that if not so, there was a concealment of a material fact, namely, the time of arrival of the Benezet.

Upon these points the Court directed the Jury as follows: That a misrepresentation or a concealment, to avoid the policy, must be of some fact, material to the risk, and important to guide the underwriter, not only as to the premium he should ask, but also whether he should underwrite at all. In regard to a concealment, there was this additional ingredient, that the fact must be of such a nature, as that the underwriters must be presumed to trust to the assured for information respecting it; and the concealment must be of facts not equally open to the knowledge of both parties, but peculiarly or exclusively within the knowledge of the assured. Facts of a public nature, such as the length of voyages, the course of trade and navigation, the chances of peace and war, the different effects of different seasons of the year on the risk, and other circumstances of a political or general nature, however material they might be to the risk, were supposed to be equally within the reach of both parties; and therefore the assured, even if he had superior skill, was not bound to disclose any thing respecting them. The underwriters are not presumed to trust him in such matters, but to rely on their own means of information and judgment.

Then, as to the first inquiry; Was there any misrepresentation, as to the fact of the Benezet's arrival? The words of the paper of instruction are: "The Benezet arrived at New Bedford, sailed after the Leonora." The argument insists, that the meaning is, that the Benezet has *recently* arrived; and it is this recency of arrival, that constitutes the very gist of the misrepresentation; for unless it is contained in the instructions, directly or by implication, so as to lead the underwriters to that conclusion, as a matter of affirmation by the plaintiff, the objection is gone. Now, it is most material to state, that there is no such word as "recently" in the paper of instructions. The words are not, "The Benezet, *recently* arrived at New Bedford, sailed," &c.; but "The Benezet arrived at New Bedford, sailed," &c. So that there is no pretence of an express averment of the recency of her arrival. Is it implied in the language? I cannot say, that it is. She had actually arrived; and it is quite consistent with the other parts of the paper, that it should intend no more than to refer to the fact of her arrival, as one either actually or presumptively within the knowledge of the underwriters; and that it was introduced, not for the purpose of referring to the true time of her arrival, but for another fact, which might not be as well known to the underwriters, namely, that she sailed after the Leonora. It ought to be a very strong case, which should induce either a Court or a Jury to interpolate a word in a sentence, which is not necessary to make it sensible, or which is not fairly and clearly implied by the nature of the terms used. It should also be considered, that the plaintiff is resident in Philadelphia; and New Bedford is in the immediate neighbourhood of Boston, and there is a daily mail between these latter places, and a daily report in the newspapers of both places (as the evidence shows) of all arrivals at the respective ports; and that it is usual for the

presidents of insurance offices to examine the newspapers for this purpose. And in point of fact, the daily newspaper, taken by the defendants, did contain the very information, as to the time of the arrival of the Benezet. What could be more natural, then, for a person desirous of procuring insurance in Boston, than to presume the underwriters acquainted with arrivals at Boston and the neighbouring ports, it being usual to publish such facts, and for the underwriters to take notice of them? Under such circumstances, I put it to the Jury to say, whether the plaintiff did intend to affirm any thing by implication as to the arrival of the Benezet being recent, or whether he only referred to the fact of her arrival, as being within the knowledge or means of knowledge of the underwriters, as well as of himself, for the purpose of stating, that the Benezet sailed *after* the Leonora. If they should think, that there was an averment, that the Benezet had *recently* arrived, and that the fact thus stated was material to the risk, then their verdict should be for the defendants; if otherwise, then there had been no misrepresentation affecting the policy.

Then, as to the concealment, the charge was to this effect: The concealment, as had been already stated, must be of a material fact, peculiarly within the knowledge of the party, and in respect to which the other party may be presumed to trust him; and not of such public facts as may be presumed to be equally open to both parties. Now, there was clearly no concealment of the fact, that the Benezet had arrived, or of the port (New Bedford) at which she had arrived, which is in the neighbourhood of Boston, and much nearer to that place, than to the plaintiff's residence. And in this part of the case, then, there is no room for any argument about recency of arrival. The concealment is argued to be of the fact of her having arrived thirty-three days before. In the first place, was

not this a fact, under the circumstances, equally open to the inquiry and ascertainment of both parties? Was it not a fact of general notoriety, and capable by the slightest diligence of being as easily ascertained by the underwriters, as by the plaintiff? The information given was sufficient to put the defendants upon inquiry, if they had chosen to do so. They asked no farther information of the fact, and they made no farther search. If the time of arrival was at all material, was it not their duty then to make it? I think it was. The notice to them was sufficient to put them upon inquiry; and they must be presumed to have notice of all facts, which under such circumstances they might reasonably know.

In the next place, was the fact of such a nature, as that the defendants could be presumed to trust the plaintiff in regard to the fact? Or could he fairly be presumed to believe, that they trusted him in regard to it? Did the plaintiff intend to put them upon inquiry, or to give them notice to rely upon their own knowledge of the time of arrival of the Benezet, by the ordinary means, by which such arrivals are usually known? If so, it does not seem to me, that the defendants can now fairly turn round, and accuse him of a material concealment of a fact open to both parties, and as to which they did not trust to his knowledge, but relied upon themselves.

But was the fact itself material? And if material, how far was it material? The representation was, that the Leonora sailed on the 12th of April, which was three days earlier than the time of her actual sailing. So that at the time of insurance she was represented as being out 129 days, whereas she was out only 126 days. Now, the time of the arrival of the Benezet could be no otherwise material, than with reference to the fact, whether the Leonora was out of time or not. This was a matter upon the facts so disclosed perfectly open for both parties to consider and decide upon. The

underwriters are bound to know the ordinary length of passages and voyages, the seasons of the year, and the common causes, which may retard or accelerate a voyage. When the facts are given, they are bound to know, and decide for themselves, whether the vessel is out of time or not. The assured is not bound to disclose to them his opinion upon that matter. Mr. Cook stated at the trial, that he did not think the Leonora out of time, and that the ordinary passage is from 120 to 130 days; other witnesses think the ordinary passages somewhat less; and one in particular says, that it is from 110 to 120 days. The only bearing of the time of the arrival of the Benezet was, as a collateral fact aiding or repelling the conclusion, as to the length of common voyages, and as to the Leonora being or not being out of time. For, as she sailed after, and not with, the Leonora, there was no necessary connexion in regard to winds, and weather, and passages, between them. Under such circumstances, it seems to me, that there was no concealment on the part of the plaintiff, which could affect the policy. The defendants were fairly put upon inquiry and the exercise of their own judgment; and they cannot now complain, that they did not examine or inquire farther. Their conduct amounted to a waiver of it.

Such was the substance of the charge on this point; and upon mature deliberation, I adhere to it. No case has been cited, which propounds a different doctrine; and it seems to me, that it stands confirmed by the general principles of the adjudged cases on the subject of notice, and especially by those, which have been decided in regard to concealment in cases of policies. The doctrine in *Fort* v. *Lee* (3 Taunt. R. 381) is far more strong; for there it was held, that it was not necessary for the assured to discover to the underwriter, whether a vessel, sought to be insured at and from a port, had

sailed or not. The Court said: If the underwriter had wanted to know the fact, he ought to have inquired. I am, therefore, of opinion, that this exception ought to be overruled.

The next exception is, that the Court instructed the Jury, that there could not be a gaming policy within the meaning of the law of Massachusetts, unless both parties intended it as such. The charge of the Court upon this point was to the following effect: — There cannot, strictly and abstractly speaking, be a gaming policy or other gaming contract under our law, unless both parties concur in the object. For if one intends to game, and the other does not, they do not, strictly speaking, come *ad idem*; and to form any contract, there must be a deliberate assent by both parties to the same thing. In the present case it is agreed on both sides, that the defendants never intended to enter into a gaming policy; and therefore it seems to me, that in a strict sense it cannot be treated as a gaming contract. But I do not think this is of any real importance in the cause, because if, as is conceded, the defendants did intend only to underwrite a policy substantially on interest, and they have been misled by the plaintiff to underwrite one not upon interest, it is in construction of law a fraud upon them, and the policy is void. On the other hand, if both parties intended *bonâ fide* a policy on interest, and the plaintiff had a substantial interest on board, and the over-valuation was *bonâ fide* made, and not with an intention to defraud or mislead the defendants, then the policy is good, and the plaintiff is entitled to recover. The question, then, in this aspect, resolves itself into two points; first, whether there has been a great over-valuation of the profits upon the property on board; and if so, secondly, whether it was *bonâ fide* made, or for the purpose of fraud or deception. If the plaintiff intended it to be a gaming

policy, and concealed it from the defendants, it is void, not as a gaming policy, but as a fraud. Such was the charge.

Was the Court wrong, then, in saying, that the policy was not a gaming policy, in a strict sense, under the law of Massachusetts? It is clear, that the law of this State must govern in this case; and I confess, that I am unable to perceive any error in this part of the charge. To form a contract, both parties must concur in the same purpose. A gaming contract *ex vi terminorum* is a contract, in which both parties agree to game. And here both parties never intended to game. This is admitted. How, then, could the Court hold a different language, without overturning the first element of all contracts, mutual consent in the same thing.[1]

But let us see, what contracts are deemed by the law of Massachusetts gaming contracts. The Statute of March 4th, 1786, (Stat. 1785, ch. 58,) declares, "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration shall be for any money or other valuable thing whatever, won by gaming, or playing at cards, dice, or any other game or games whatsoever, or by betting on the side or hands of any person gaming, or for the reimbursing or repaying any money, knowingly lent or advanced at the time and place of such play to any person or persons so gaming or betting, or that shall during such play so play or bet, shall be void, and of no effect." It afterwards provides for the recovery back of money lost at play; and also inflicts penalties on the winner or person taking such security. Now, it is most manifest, that a policy of insurance entered into without interest is not a gaming contract or secu-

[1] See *Walcot* v. *Eagle Insurance Company*, 4 Pick. R. 429, 437.

rity within the purview of this Act. It is neither within the words nor within the intent. And there is no Statute of Massachusetts, which does prohibit gaming policies in terms. If prohibited at all, they are prohibited solely by the common law. And so was the doctrine of the Supreme Court of the State, in *Amory* v. *Gilman* (2 Mass. R. 1.)

It is true, that, in a loose sense, a policy underwritten knowingly by both parties without interest, is among us sometimes spoken of, both at the bar and on the bench, as a gaming contract. But this is not perfectly correct in legal language. It is more properly called a wager policy, at least in the sense of our law, where the word "gaming" has a limited and distinctive sense in the Statute Book.[1] And accordingly in *Amory* v. *Gilman* (2 Mass. R. 1) the Court uniformly treat a policy without interest, as a wager policy, and give it that appropriate appellation. Nor is this a mere criticism upon language; for no one could pretend, upon sound reasoning, that a wager did not purport a unison of opinion and agreement of both parties to the same thing. A wager on one side would be a novelty in jurisprudence. The very form of a declaration on a wager demonstrates the truth, that the contract must involve a mutuality of consent, as to the wager and the risk run.[2]

If we pass to the jurisprudence of England, we shall find the same distinctive appellation applied by elementary writers, by the bar, and by the bench, to characterize policies without interest.[3] Gaming is a species of wager; but in a strict sense all wagers are not gaming contracts, though they

[1] See 3 Kent's Com., Lect. 48, p. 275, 2d edition.

[2] See *Kent* v. *Bird*, Cowper R. 583.

[3] 1 Marshall on Insurance, B. 1, ch. 4, § 2. Park on Insurance, ch. 14.

are often figuratively so called. Marshall and Park entitle their chapters on policies without interest, as wager policies.[1] The Statute of the 19th of George II., ch. 37, after reciting, that policies without interest have been productive of pernicious practices, and have introduced "a mischievous kind of *gaming*," proceeds to declare, "that no insurance shall be made on any ship, &c., or any goods, &c., *interest or no interest*, or without further proof of interest than the policy, *or by way of gaming or wagering*, or without benefit of salvage to the insurer; and that every such insurance shall be void."[2] But the Statute does not apply to insurances for foreigners. It is doubtless with reference to the very language, as well as the objects of this Statute, that the bar and bench sometimes speak of policies without interest, as gaming policies. But (as I have said) the general and more exact appellation is wager policies. Thus, in the case of *Kulen Kemp* v. *Vigne*, (1 T. R. 304,) where the policy was without interest, Lord *Mansfield* said, "This is a wagering policy." Mr. Justice *Ashurst* used similar language. And Mr. Justice *Buller* said, "Policies are of two sorts, either upon interest, or by way of wager." "This is a wagering policy." And again in *Da Costa* v. *Firth*, (4 Burr. R. 1966, 1969,) which was a policy not within the Statute, Lord *Mansfield* said: "It is a mixed policy, partly a wager policy, partly an open one; and it is a valued policy, and fairly so, without fraud or misrepresentation. Therefore, the loss having happened, the insured is entitled to recover, as for a total loss. The insurer agreed to the value, and is concluded to dispute it."[3]

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[1] Marshall on Insurance, B. 1, ch. 4.

[2] Ibid. § 2, p. 127, (2d edition.)

[3] See *Lucena* v. *Crawford*, 5 Bos. and Pull. 269, 321-323. *Cousins* v. *Nantes*, 3 Taunt. R. 513, 515, 523.

I do not mean to deny, that policies not on interest are sometimes called gaming policies, though they are more generally called wagering policies.[1] But what I do mean to assert is, that, whether the one phrase or the other is used, it imports the same thing, that is to say, that the parties mutually and knowingly consent to the gaming or wager; and that there cannot be a gaming or a wagering policy without such mutual consent. In all the cases in England on the subject of wager policies it will be found, that the contract either included in its terms the prohibited stipulations of the Statute of George II., ch. 37, as to interest, or no interest, &c.; or that other equivalent words were used in the policy. The principle of law in England is, that every policy is to be deemed a policy on interest, unless it appear otherwise on the face of it. Lord Chief Justice *Mansfield*, in delivering the opinion of the Court of Exchequer Chamber, in the case of *Cousins* v. *Nantes*, (3 Taunt. R. 513, 523,) said: "Every policy must be taken to be a policy on interest, unless something be stated showing the contrary."

There is this difference between policies in America and policies in England, containing stipulations, like those in the present policy, "interest or no interest," or "without farther proof of interest than the policy," that in the latter country, such policies being prohibited as wager policies, the insertion of the prohibited words in the policy is proof *de facto*, that they are mere wagers; whereas in America such policies are not treated as necessarily purporting to be wager policies; but they are deemed policies on interest, if the parties so understood, and agreed. So it was held in *Amory* v. *Gilman* (2 Mass. R. 1), and in *Clendenning* v. *Church* (3 Cain. R.

[1] See *Lowry* v. *Bourdieu*, Doug. R. 469, 470.

141). *Primâ facie* they so import; but the implication may be rebutted by proofs or admissions.

Now, in the present case, it is (as I have already stated) admitted, that the defendants meant to enter into a policy on interest, and not into a wager policy. They did not intend to wager or game, but to insure substantive interests. Whatever, then, the terms used are, the policy is to be deemed in point of law an interest policy. The plaintiff insists, that he meant it to be an interest policy; and if he had a substantive interest on board the ship, capable of being insured, I cannot perceive upon what principle the defendants can now treat it as a gaming policy. The policy was a wager policy, as to both parties, or as to neither party. It has not a double character, as a policy on interest as to one, and not as to the other. If it be a policy on interest, then undoubtedly the plaintiff cannot recover, unless he shows an interest; for, in Massachusetts at least, the doctrine of *Goddard* v. *Garrett* (2 Vern. R. 269) is in full force.

But, whether the Court were in a strict and technical sense right in this view of the matter or not, I still think, that the Court did put the law applicable to a case of this sort correctly to the Jury. The Court said, that if the defendants meant to insure on interest, and the plaintiff meant a gaming policy, it was void; so that the point as to the gaming was put as favorably for the defendants, and as directly to the Jury, as it could be.

The next exception is, that the Court instructed the Jury, on the point of valuation, that the plaintiff was entitled to a verdict, unless there was an over-valuation made by the plaintiff fraudulently, and with a design to deceive the defendants. To understand this exception fully, it is proper to state, that the line of argument of the Counsel for the defen-

dants on this point was, that if there was a designed gross over-valuation of the profits by the plaintiff, (whatever might be the moral character of the transaction,) it was in point of law a constructive fraud upon the defendants, which avoided the policy; and that a trivial interest would not save the policy. And the Court expressly gave the same opinion to the Jury. No point was made or argued, as to any over-valuation by mistake. But after the close of the argument, the Counsel for the defendants requested the Court to instruct the Jury, that if the plaintiff expected a larger shipment of goods than was actually shipped, and made his valuation of profits upon that basis accordingly, then, that he was entitled to recover only *pro ratâ*, as the actual shipments bore to the expected shipment. And to this doctrine the Court assented; and instructed the Jury accordingly.

The charge of the Court is now complained of, because it put the case of gross over-valuation, as a question of fraud, solely to the Jury. Now, in so doing, it did no more than repeat the very doctrine asserted by the defendants' Counsel; and it was no part of its duty to suggest any other points, which in certain postures of the case might possibly have been urged by Counsel. But I am yet to learn, that the law is otherwise than it was stated by the Court. By the law of Massachusetts valued policies are valid in general; and certainly valued policies on profits fall within the same rule.[1] What then is the effect of the valuation in point of law? It is, that it shall, in all cases of total losses, where there is a

[1] See *Grant* v. *Parkinson*. Marshall on Insurance, ch. 3, § 8, p. 97. *Barclay* v. *Cousins*, 2 East R. 544. *Henrickson* v. *Margetson*, Ib. 549, n. *Abbott* v. *Sebor*, 3 Johns. Cas. 39. Phillips on Insurance, ch. 3, § 8, p. 46. *The Patapsco Insurance Company* v. *Coulter*, 3 Peters R. 222, 238.

substantial interest, and *bona fides*, be conclusive in respect to the value. It is true, and it was so stated by the Court, that a trivial interest will not save the policy. Neither will a substantive interest, if there is an intent to deceive or mislead the underwriters. And a gross over-valuation affords a presumption of fraud. But if the policy is procured in entire good faith; if there is no intent to deceive; and if there is a substantial interest; then the over-valuation, whatever it may be, is unimportant. The assured is entitled to recover upon general principles of law. And, indeed, under such circumstances, the underwriters are estopped to press the inquiry.[1] And in the very policy before the Court, the defendants not only agreed to the valuation, and received the premium for it; but they expressly stipulated, that the policy should be the only proof of interest required. Upon what ground, other than fraud, are they entitled to escape from such a stipulation? If the policy is upon interest, and the valuation fairly made, and they agreed to be bound by it, and they have not been deceived; what right can they have to insist, that they ought not to perform their agreement?

No case has been cited, which affirms a different doctrine; and there are many, which inculcate this doctrine in cogent terms. In *Lewis* v. *Rucker*, (2 Burr. R. 1171,) Lord *Mansfield* said: "It is settled, that upon valued policies the merchant only need prove some interest to take it out of the Statute of 19th George II.; because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing. But if it should come out in proof, that a man had insured £ 2,000, and had an interest on board to the value of a cable only, there never has been, and I believe there never will be a determination, that

[1] See 2 Kent Com., Lect. 38, pp. 272, 273, 2d edition, and id. note (d.)

by such an evasion the Act of Parliament may be evaded. There are many conveniences from allowing valued policies. But where they are used merely as a cover to a wager, they would be considered as an evasion." Lord *Mansfield*, in the case of *Da Costa* v. *Firth*, (4 Burr. R. 1969,) in the passage already cited, held the same doctrine. I am not aware, that a different doctrine has been anywhere established.[1] If the over-valuation be *bonâ fide* and innocent, the policy is good; if fraudulent, it is void.

Then, as to the other point, in which the defendants' Counsel prayed the instruction of the Court on the effect of an *expected* shipment and an *actual* shipment, complaint is made, that it was not made sufficiently intelligible to the Jury. How that matter was, I cannot say. But I am bound to presume, that they understood the point. Certainly, if it had been deemed very material in the actual posture of the case, it might have been commented upon by the Counsel for the defendants; and the Court would have made any further explanations, which they should have requested. But the truth is, that in the actual state of the evidence there were no facts to raise the point; and so the evidence was stated to the Jury at the suggestion of the defendants' Counsel. At the time of the insurance, the plaintiff had a perfect knowledge of all the shipments addressed to him by the Leonora; and if so, there was no ground to say, that he then expected none.

The next exception is, that the verdict is against evidence, or at least against the weight of evidence. The argument is,

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[1] See Phillips on Insurance, ch. 14, § 1, pp. 305, 306. *Marine Insurance Company* v. *Hodgson*, 6 Cranch R. 206. *Feise* v. *Aguilar*, 3 Taunt. R. 506. *Coolidge* v. *Gloucester Insurance Company*, 15 Mass. R. 341, 344.

that the evidence in the cause established, that the over-valuation was so gross, that it was necessarily presumptive of fraud; that it could not enter into the reasonable expectations of any man to make such profits on such a voyage; and that the Jury have been wholly mistaken in their verdict.

In considering questions of this nature, I confess myself among those judges, who are very reluctant to intermeddle with the verdicts of juries in mere matters of fact. There was a time, when courts were disposed to go an extravagant length on this subject, and to set aside the verdict of the Jury, merely because, in the opinion of the Court, the weight of evidence was on the other side. This was, indeed, substituting the Court for the Jury in trying the credibility of testimony, and the weight of evidence. For one, I am not disposed to proceed far upon this dangerous ground; and in matters of fact, I hold it to be my duty to abstain from interposing with the verdict of a jury, unless the verdict is clearly against the undoubted general current of the evidence; so that the Court can clearly see, that they have acted under some mistake, or from some improper motive, or bias, or feeling.[1] I adopt the language of Lord *Ellenborough*, in *Carstairs* v. *Stein* (4 M. & Selw. R. 192, 199): "The question before us is not, whether the verdict given in this case is such, as we should ourselves have given; but whether, having been given by a jury, to whom the whole case was fully left in point of fact, and to whom the law upon the subject was distinctly stated, it ought to be set aside, upon the grounds of the argument now suggested to us, namely, that they have drawn an erroneous conclusion." And upon a question of fraud in fact, which is made up of so many ingredients, and is so peculiarly

[1] See *Thurston* v. *Martin*, 5 Mason R. 497. *Blunt* v. *Little*, 3 Mason R. 102, 106.

within the province of a jury, I do not hesitate to say, that I should be more reluctant to interfere, than in many other cases.

Now, upon the evidence, it was clear, that there could not be any profit upon bullion; for it was said, that none is ever made or expected. Upon the hides, according to the calculations, variously made by the plaintiff, there might be a profit from $1700 to $2500. On the other hand, by the calculations offered by the defendants, and supported in a good measure by the evidence, there might under some aspects be even a loss, and at all events there could not be a profit exceeding $100 or $200. These calculations were submitted to the Jury; and the question was left to them in this way, whether the over-valuation of the profits was designed to mislead the defendants into underwriting a policy not in fact on interest. If they thought it was, then, the policy was void. Their verdict in effect was, that the over-valuation was not fraudulent, but *bonâ fide*. And if the Court now sets aside their verdict, it must be, because the Court now clearly sees, that the Jury ought upon the evidence to have found the over-valuation fraudulent. If it was a measuring cast, then, as the *onus probandi* was on the defendants, the verdict ought not to be disturbed.

Now, certainly, I have a good deal of difficulty upon the evidence in seeing, how such an over-valuation could have been reasonably made. But, on the other hand, I have a good deal of difficulty in imputing fraud to the plaintiff. I do not know, that any over-valuation, however great, if it steers wide of a wager and a fraud, can be otherwise impeached.

There is something, too, in the nature of an insurance on profits, which distinguishes it from any other insurance, whether on ships, or on goods, or on freight. The latter are

generally susceptible of an exact valuation. But profits are not. In their very nature they are contingent and speculative; and upon them men's judgments, as well as their imaginations, run wide from each other. It has been truly said at the argument, that there can be no standard of valuation of profits. They are matters of expectation. A policy on profits is not an insurance upon results, but upon expectations. The party insures, not what profits he would actually make, but what he expected to make. It is difficult to measure men's expectations. There are complexional differences of mind on such subjects. There are vast distances between the moderated views of the timid and cautious, and the high-colored views of the sanguine and enterprising.

It is not sufficient to justify the Court in setting aside the present verdict upon this ground, that it should doubt, whether the over-valuation was innocent. It must clearly see, that it was fraudulent. Suppose the verdict should be set aside; and upon a new trial the Jury were to find for the defendants; would that be entirely satisfactory? Might not the plaintiff fairly contend, that it was only verdict against verdict on a question of fact; and, therefore, that there should be a third trial to settle the controversy?

I am not insensible of the force of the defendants' argument on this point. But after all, it turns upon this, that the Court must find the fraud, which the Jury refused to find. In *Coolidge* v. *The Gloucester Insurance Company*, (15 Mass. R. 341, 344,) the freight was valued at three times its real value; and yet the Court refused to open the policy. In the case of *The Patapsco Insurance Company* v. *Coulter*, (3 Peters Sup. C. R. 222,) which was upon a policy on profits, valued at $20,000, the Supreme Court held, that it was not necessary to show, that any profits would have been made. Now, this must have proceeded upon the ground, that, if the

valuation was *bonâ fide*, however great, it was of no consequence, whether it could or could not be shown, that profits would have resulted from the voyage. The Court asked, what human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous?

Upon the whole, upon this point, whatever might be the scruples of my own mind upon the evidence, if I were sitting in the jury-box, I cannot say, that it clearly appears to me, that the Jury were wrong in finding, that the over-valuation was not fraudulent. I am not bold enough to disregard their judgment in a case fairly before them, upon a matter of fact purely and fitly within their province.

I come, then, in the last place, to the new evidence, discovered since the trial; and that is, that a prior policy was underwritten at New York on profits valued at $10,000, on the same voyage and risk, which has been paid. This is perfectly consistent with the plaintiff's case, and furnishes no new matter of defence; since in the present policy the profits are valued at $20,000; so that the amount is sufficient to cover both policies. It is, therefore, at most, the case of newly discovered evidence to an old point of defence. Now, the objections taken to it, as a ground for a new trial, are, in the first place, that the defendants at the trial made the point, that there was in all probability another policy on profits, and yet that they used no diligence, though they were thus put upon inquiry, to ascertain the fact. And what is still more strong, that having a clear right in this Court upon motion to have compelled the plaintiff in this very cause to disclose the fact, whether there was any prior policy or not, they chose to go to trial without making the inquiry, though it is plain, that ordinary diligence would have brought it out. There is great force in this reasoning; and no answer was given to it at the argument, which entirely satisfied my mind.

To set aside a verdict under such circumstances, on account of such newly discovered evidence, would be to encourage laches, and want of diligence, in regard to matters manifestly open to inquiry, under the common priority clause in our policies. It would enable the party to take a double chance for a verdict.

But what is the nature of the new evidence? It is said, that it is not merely cumulative, because it shows, that the plaintiff had already received $10,000 profits on the same voyage. But what has that to do with his title to recover $10,000 more, if the profits are *bonâ fide* valued in the second policy at $20,000? It is, therefore, merely as it bears upon the point of over-valuation, that it has any relevancy to the cause. And I cannot say, that I see much in it, in a legal sense, even under this aspect; for, the valuation being $20,000, the argument as to the over-valuation is precisely the same in form and pressure, in point of law, (whatever it may be as matter of remark to a jury,) whether the plaintiff stood underwriter for the remaining $10,000, or procured it to be insured. In either view, the valuation must stand or fall, as a valuation for $20,000, and not for $10,000. If, indeed, there had been expected shipments not actually put on board, and so an apportionment might have been required, then it might have become more material. But this, as I have already said, was excluded by the state of the facts.

I can contemplate this evidence, then, in no other light, than as cumulative evidence. Now, it has been long established, as a just and reasonable practice, not to grant a new trial to introduce new witnesses, or new evidence, to points before in controversy. And there would be no safety in trials upon any other doctrine. *Steinbach* v. *The Columbian Insurance Company* (2 Cain. R. 129), *Smith* v. *Brush* (8 Johns. R. 84), and *Williams* v. *Baldwin* (18 Johns. R.

489) are directly in point. The cases of *Gardner* v. *Mitchell* (6 Pick. R. 114), *Inhabitants of Yarmouth* v. *Inhabitants of Dennis* (6 Pick. R. 116, note), *Chatfield* v. *Lathrop* (6 Pick. R. 417), and *Baker* v. *Briggs* (8 Pick. R. 122) adopt the same principle.[1] And it seems also to prevail in England.[2]

I have thus gone over all the grounds urged with so much earnestness and ability in favor of a new trial. The conclusion, to which my mind has arrived, is, that the Jury have not been misdirected in any matter of law; and that as to the matter of fact, it was fairly open before them, and peculiarly within their province; and I cannot judicially say, that the conclusion, to which they have come, is clearly erroneous, and must have arisen from some unquestionable mistake, or some improper motive or bias. In my judgment, therefore, the motion for a new trial ought to be overruled.

New trial denied.

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1 See also cases in Bigelow's Digest, Review and New Trial, C. *k.*, p. 681. *Astor* v. *Union Insurance Company*, 7 Cowen R. 202. *Ackley* v. *Kellogg*, 8 Cowen R. 223. *Douglass* v. *Tousey*, 2 Wendell R. 352. *Smith* v. *Hicks*, 5 Wendell R. 48.

2 See *Dickinson* v. *Blake*, 7 Brown Par. Cas. 177. *Carstairs* v. *Stein*, 4 M. & Selw. 192, 199. *Sprague* v. *Mitchell*, 2 Chitty R. 271.

ANTOINE F. PICQUET, ADMINISTRATOR,

v.

CHARLES P. CURTIS, ADMINISTRATOR OF JAMES SWAN, DECEASED.

Where bills of exchange were specially indorsed, and the indorsement still continued uncancelled, and there were no re-indorsements, or other evidence of any subsequent assignment; *held*, that possession by the original indorser is *prima facie* evidence, that he is the owner of them.

Where bills of exchange are made payable at a particular place, no action can be maintained until after a demand at that place, and a dishonor there. Therefore, the Statute of Limitations begins to run from the time of such demand, and not from the time, when the bills were payable according to their tenor.

ASSUMPSIT on a large number of bills of exchange, drawn on the 4th of July, 1811, by one Fretag in Paris, payable to his own order, on James Swan, (the deceased,) and accepted by him in Paris, payable in Boston, (Massachusetts,) at different and distant dates. All of them were indorsed to the plaintiff's intestate by Fretag, and fell due between February, 1813, and February, 1822; and all of them were dishonored. The whole amount of the bills was about $97,759. The declaration contained, besides the money counts, a number of counts upon the bills, alleging a title in the plaintiff, by the indorsements to his intestate. Among the pleas there were, (1.) the general issue to all the counts; (2.) the plea of the Statute of Limitations. Replication to this plea, that Swan was without the United States, and left no property within the limits of Massachusetts, which was attachable by the ordinary process of law. The defendant rejoined, that Swan left attachable property within the Commonwealth, &c.; upon which issue was joined by the parties.

Upon these issues the cause came on for trial at the present term; and a verdict was found for the plaintiff. At the trial it was found, that payment of the bills was demanded

for the first time in Boston on the 15th of November, 1823; and the bills were then dishonored and duly protested therefor. Swan never was within the United States after the time, when the bills were drawn; and was at that time domiciled in Paris; and died at Paris in 1831. It did not appear, that Swan ever had any funds in the United States to pay any of the bills.

A motion was now made for a new trial, and argued by *Charles G. Loring* for the defendant, and *Blair* and *Fletcher* for the plaintiff. The grounds of the motion will be found in the opinion of the Court.

Story J. The present motion for a new trial has been made on behalf of the defendants, not so much perhaps from any strong doubts as to the points ruled by the Court; but from an anxious desire of the defendant acting *in autre droit*, not to be supposed to omit any practical duty to those, whom he represents. I appreciate the motive; and have considered the points made, with as much care, as if they had been urged in the earnest conviction, that they were beyond question in favor of the defendant.

The first ground is, that the Court instructed the Jury, that the plaintiff was entitled to maintain the action upon thirteen of the bills, which appeared to have been specially indorsed by his intestate to other persons, notwithstanding the indorsements were not cancelled, when the bills were produced, and there were no re-indorsements, or other evidence, of any subsequent assignment to him, excepting the plaintiff's possession of the bills. And such was certainly the direction of the Court. I was aware then, and still am, that the authorities are at variance on this point; but I am of opinion, that the better authorities clearly establish the principle, that the possession of such bills, after such special indorsements by the indorser, is *primâ facie* evidence, that he is the owner of them, and that

they have been returned to him, and taken up in due course upon their dishonor; so that he is remitted to his original rights. It seems to me, that this is the natural presumption from the facts; and that it would be difficult upon any other supposition to account for such possession by the indorser, which must deprive the special indorsee of the means of enforcing any adverse rights against him. I do not say, that the presumption is conclusive; but I think it *primâ facie* sufficient to found a title in the indorser, until it is rebutted by some controlling circumstances. This doctrine was directly approved by the Supreme Court of the United States in *Dugan* v. *The United States*, (3 Wheaton R. 172,) where the Court laid down the rule, "That if any person, who indorses a bill of exchange to another, whether for value or for purposes of collection, shall come into possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bonâ fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper." This doctrine would be conclusive upon my judgment sitting here, even if I entertained doubts upon the subject. But I was one of those judges, who concurred in that opinion; and I now adopt it, *toto animo*, with a solid confidence. And I think it may fairly be inferred, that such is also the French law, from the passage cited so frankly at the bar by the defendant's Counsel from the work of Pardessus on the Commercial Law of France.[1]

The other point is, that the Court instructed the Jury, that

[1] 2 Pardessus, p. 179, art. 349.

the Statute of Limitations began to run from the time of the presentment for payment, to wit, on the 15th of November, 1823; and not from the times, when the bills were respectively payable according to their tenor. I remain of opinion, that this direction was right, according to the principles of the common law. It is to be recollected, that this is a suit against the acceptor of the bills, and that they were payable in Boston. In my judgment, no action could be maintained until after a demand was made in Boston, and a dishonor there. The decision of the House of Lords in the great case of *Rowe v. Young*, (2 Brod. & Bing. R. 165; *S. C.*, 2 Bligh R. 391,) settled this, as to inland bills, upon principles, which strike my mind as irresistible. And there cannot, I believe, be found a single authority, that denies it in relation to foreign bills. It would, in my humble judgment, be a monstrous doctrine, to hold, that upon a bill drawn upon England, and accepted here, payable in England at a particular time after date, the holder might maintain an action against the acceptor without transmitting the bill to, or asking payment in England.

I have looked into the Code of Commerce of France, to ascertain, whether any different rule is there established; for, as these bills were contracts made in France, and the acceptances in France, the rights and responsibility of the acceptor may, in some measure, depend upon the laws of France, although payment is to be made in Boston. What I have been enabled to find, satisfies me, that by the law of France, in cases of this nature, there must be a demand of payment of the bills at the place assigned, and a protest of dishonor, before a suit is maintainable against the acceptor. The 123d article of the Code of Commerce declares, that the acceptance of a bill of exchange, payable in another place than that of the residence of the acceptor, must

indicate the domicil, where the payment is to be made, or the protest in case of non-payment. Another article (art. 173) requires a protest to be made in cases of non-payment; and another (art. 184) declares, that interest on the principal of the bill of exchange, protested for non-payment, is due from the date of the protest. These articles seem to me to close all controversy on this point. They show, that there is no default in the acceptor, which puts him *in mord*, or default, until a demand and protest at the place of payment.

I therefore overrule the motion for a new trial.

JOHN AMES *v.* CHARLES HOWARD AND OTHERS.

Patents and specifications annexed thereto should be construed fairly and liberally, and not subjected to any over-nice or critical refinements.

Where an invention is so loosely and inaccurately described in the specification, that the Court cannot, without resorting to conjecture, gather what it is, then the patent is void; but if the Court can clearly see the nature and extent of the claim, however imperfectly and inartificially it may be expressed, the patent is good.

A patent contained the following words in the description of the invention: "I do not claim the felting, vats, rollers, presses, wire-cloth, or any separate parts of the above described machinery or apparatus, as my invention; what I do claim as new, and as my invention, is the construction and use of the peculiar cylinder above described, and the several parts thereof in combination for the purpose aforesaid." *Held*, that it is not the cylinder alone, or its several parts, which are claimed *per se*, but they are claimed in their actual combination with the other machinery, to make paper.

Semble, that no previous notice or claim of a right to the exclusive use of an invention is necessary to enable a patentee to maintain an action for an alleged violation of his patent-right.

It is the practice of this Court, in all cases of surprise at the trial, by new matter proving a ground material to either party, and clearly made out by affidavit, to postpone or continue the cause. If the party interested, however, elects to go on with the cause, relying upon other matters, he is understood to waive the matter of surprise, and he cannot take his chance with the Jury, and, if unsuccessful, then move the matter as a ground for a new trial.

A new trial is not granted upon mere cumulative evidence.

The defendants cannot put in new rebutting evidence to affidavits of the plaintiff, offered in reply to those first offered by the defendants.

Case for an infringement of a patent-right for a new and useful improvement in the machinery for making paper. The specification annexed to the patent contained the following summary of the invention, as claimed by the Patentee: "The drawing hereto annexed is to be taken and considered as a part of this specification. But it is to be understood, that I do not claim the felting, vats, rollers, presses, wire-cloth, or *any separate parts of the above described machinery or apparatus, as my invention.* And I hereby declare, that what I claim, as new and as my invention, is the construction and use of the peculiar kind of cylinder above described, and the several parts thereof in combination for the purposes aforesaid." The cylinder here referred to is particularly described in the specification, and it is there stated to be partly immersed and used in the vat containing the paper pulp, "having one end of the cylinder close to the side of the vat, which forms a covering therefor." And in another part of the specification it is stated: "One end of the cylinder thus formed is to be covered, and made water-tight by a copper or other sufficient covering, and the other end, uncovered, is to be brought and kept in close contact with the side of the vat or reservoir aforesaid, which is to be so adapted to it, as to form a covering water-tight for that end of the cylinder, which while it revolves is below the top of the vat or reservoir." The specification then proceeds to describe the mode in which the water, draining through the cylinder, is to be conducted off through a hole in the side of the vat, which covers the open end of the cylinder. It was not disputed at the trial, that the cylinder was not capable of, nor intended for, any distinct use separate from the vat; and that to make paper on it, it was indispensable, that it should be placed in the vat in the manner above described. Plea, the general issue, with notice of special matter.

At the trial it was contended by the defendants, that the true construction of the patent was, that the plaintiff claimed only the cylinder, and the several parts thereof, in combination with each other, as his peculiar invention. The Court thought otherwise; and declared to the Jury, "that the patent is for the construction and use of the peculiar kind of cylinder, and the several parts thereof, in combination *with the other parts of the machinery*, for the purpose of making paper. It is for the combination, and not for the separate parts thereof. It is not for the peculiar structure and use of the cylinder alone, as the invention of the plaintiff; but it is for it in, and as a part of, the combination. Nor is it alone for the several parts of the cylinder, in actual combination by themselves with each other; but in the combination with other parts of the machinery to produce paper."

At the trial the cause was argued by *William Bliss* and *Rand* for the plaintiff, and by *George Bliss* and *Fletcher* for the defendants. The Jury found a verdict for the plaintiff, for $412·50 single damages.

A motion was afterwards made by the defendants for a new trial, the grounds of which appear in the opinion of the Court, and was argued by *Rand* for the plaintiff, who cited *Smith* v. *Brush*, 8 Johns. R. 84; *Pike* v. *Evans*, 15 Johns. R. 210; *Williams* v. *Baldwin*, 18 Johns. R. 489; *Strong* v. *Hogg*, 2 Wm. Black. R. 802; *Ford* v. *Tilly*, 2 Salk. R. 653; *Watson* v. *Sutton*, 1 Salk. R. 272; *Cooke* v. *Berry*, 1 Wils. R. 98; *Gist* v. *Mason*, 1 Term R. 84; *Stander* v. *Edwards*, 1 Ves. Jr. R. 134.

Fletcher, for the defendants, cited *Smith* v. *Brush*, 8 Johns. R. 84; *Pike* v. *Evans*, 15 Johns. R. 213; *Guyot* v. *Butts*, 4 Wendell R. 579; *Warren* v. *Hope*, 6 Greenl. R. 480.

Story J. The first ground of the motion is on account of a supposed misconstruction of the patent of the plaintiff by

the Court. And the question now is, whether the direction of the Court was right in point of law. Patents for inventions are not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored; nor are they to be construed with the utmost rigor, as *strictissimi juris*. The Constitution of the United States, in giving authority to Congress to grant such patents for a limited period, declares the object to be to promote the progress of science and useful arts, an object as truly national, and meritorious, and well founded in public policy, as any which can possibly be within the scope of national protection. Hence it has always been the course of the American Courts, (and it has latterly become that of the English Courts also,) to construe these patents fairly and liberally, and not to subject them to any over-nice and critical refinements. The object is to ascertain, what, from the fair sense of the words of the specification, is the nature and extent of the invention claimed by the party; and when the nature and extent of that claim are apparent, not to fritter away his rights upon formal or subtile objections of a purely technical character.

Now, let us see, what is the invention, as claimed by the plaintiff in the specification in this case. I agree, that if he has left it wholly ambiguous and uncertain, so loosely defined, and so inaccurately expressed, that the Court cannot upon fair interpretation of the words, and without resorting to mere vague conjecture of intention, gather what it is, then the patent is void for this defect. But if the Court can clearly see, what is the nature and extent of the claim, by a reasonable use of the means of interpretation of the language used, then the plaintiff is entitled to the benefit of it, however imperfectly and inartificially he may have expressed himself. And for this purpose we are not to single out particular phrases standing alone, but to take the whole in connexion. The plaintiff

begins by stating negatively, what he does not claim as his invention; and this may well help us to ascertain, what he does claim. He says he does not claim "the felting, vats, rollers, presses, wire-cloth, or any separate parts *of the above described machinery or apparatus*," as his invention. Now, among the above described machinery is the cylinder, and the several parts thereof. The cylinder therefore may fairly be deemed a separate part of the machinery, for it constitutes a part separable in its nature, and distinct in its formation, though adapted to a particular mode of use. He then proceeds to say, "What I do claim, as new and as my invention, is the construction and use of the peculiar cylinder above described, and the several parts thereof in combination for the purpose aforesaid." Now the defendants read this language, as if the words were, I claim the construction and use of this peculiar cylinder, and I claim the several parts thereof in combination with each other to form a cylinder for the purpose of making paper. Let us see, whether this is consistent with giving a due effect to all the words used, and with the antecedent negative declarations of the plaintiff. He before has said, that he does not claim, as his invention, any of the separate parts of the machinery; therefore it is very clear, that he does not claim the separate parts of the cylinder. But then, it is said, he claims these parts in combination with each other. But these parts in combination with each other constitute neither more nor less than the cylinder itself; so that upon this construction the words, "and the several parts thereof in combination," are mere repetition and tautology, and have no distinct meaning. The claim is read exactly, as if these words were struck out. Certainly no court of justice is at liberty to strike out any words, which are sensible in the place, where they occur, and are capable of a distinct application. We are to give, if practi-

cable, effect to all the words, as containing a distinct expression of the intention of the party. Besides; upon this interpretation of the language, the party does not claim the construction and use of the cylinder as his own, but the application of it to a particular purpose, as his own. It requires no commentary to establish, that the application of an old thing to a new use, without any other invention, is not a patentable contrivance. A man, who should use a common coffee-mill for the first time to grind peas, could hardly maintain a patent for it. A man, who should for the first time card wool on a common cotton carding-machine, would find it difficult to establish an exclusive right to the use of it for such a purpose. So that this construction of the words of the specification could hardly be presumed to express the intention of the party; for then he would not claim the thing, but a particular use of the thing for a particular purpose. The plaintiff in the present case claims more than a mere use; he claims the construction of this peculiar cylinder, and the several parts of it. And how does he claim them "in combination"? In what manner? In combination with each other? No; but "in combination for the purpose aforesaid;" that is, for the purpose of making paper. The grammatical connexion of the passage, then, requires that we should read it, that he claims, as his invention, the cylinder itself, (as well as the several parts thereof,) in combination for the purpose of making paper. It is not then the cylinder alone, or its several parts, which are claimed *per se*; but they are claimed in their actual combination with the other machinery to make paper. In this view of the clause full effect is given to all the words, and the sense is at once natural and consistent. My judgment, therefore, is, that the construction given by the Court at the trial is correct; and that, as matter of law, there is no error in it.

The next objection is necessarily out of the case; for the comment attributed to the Court was, upon a suggestion of the defendants' Counsel, immediately withdrawn from the Jury by the Court; and the whole matter of fact contained in Gilpin's deposition, as well as its credibility, was left entirely open and free to the Jury. I cannot say, that they have misunderstood it; or that they have not drawn the right conclusion deducible from it. It was a matter peculiarly within their province; and the ample comments on Gilpin's testimony, at the trial, by the Counsel on both sides, sufficiently evinced, that it was in some parts confused and unsatisfactory, and susceptible of different interpretations.

The next objection is, that in point of law the plaintiff is not entitled, without some previous notice, or claim, to maintain this action under his patent against the defendants, for continuing the use of the machines erected and put in use by them before the patent issued. This objection cannot prevail. I am by no means prepared to say, that any notice is in cases of this sort ever necessary to any party, who is actually using a machine in violation of a patent-right. But it is very clear, that in this case enough was established in evidence to show, that the defendants had the most ample knowledge of the original patent taken out by the plaintiff in 1822, and of which the present is only a continuation, being grounded upon a surrender of the first for mere defects in the original specification. Whoever erects or uses a patented machine, does it at his peril. He takes upon himself all the chances of its being originally valid; or of its being afterwards made so by a surrender of it, and the grant of a new patent, which may cure any defects, and is grantable according to the principles of law. That this new patent was so grantable is clear, as well from the decision of the Supreme Court in *Grant* v. *Raymond* (6 Peters R. 218), as from the

Act of Congress of the 3d of July, 1833, ch. 162. There is no pretence to say, that the defendants were *bonâ fide* purchasers without any knowledge or notice of any adverse claim of the plaintiff under this original patent; and the damages were by the Court expressly limited to damages, which accrued to the plaintiff by the use of the machine after the new patent was granted to the plaintiff. Without doubt the Jury conformed in their verdict to this direction of the Court.

The other original objections may be passed over without notice, and indeed are insupportable in point of law.

But another ground for a new trial has been since filed, founded partly upon surprise at the trial, and partly upon the discovery of new evidence applicable to the point, stated at the trial, which constitutes the matter of surprise. It came out in evidence on the trial, in the course of the cross examinations, that the original cylinder constructed by the plaintiff had bars of wood, instead of brass; and one or more of the witnesses asserted, that the brass bars were substituted for wood after the grant of the original patent in 1822. This was explicitly denied by other witnesses on behalf of the plaintiff, who asserted, that the brass bars were substituted before the patent. Upon this point the parties were at issue at the trial; and it was made a strong ground of defence. No application was made to the Court by the defendants for a postponement or continuance of the cause for the purpose of a more full and thorough examination of the point, or to search for farther testimony. The uniform practice of this Court is, in all cases of surprise at the trial by new matters, forming a ground important to either party, and clearly made out by affidavit, to postpone or continue the cause. And if the party interested makes no such application, but elects to go on with the cause, relying upon his other strength to sustain his claim or defence, he is understood to waive the

matter of surprise; and he cannot be permitted to take his chance with the Jury, and, if unsuccessful, then to move the matter, as a ground for a new trial. The purposes of justice would be defeated and not advanced by any different course. And Courts, which adopt a different rule, act upon the ground, that in their own modes of trial and practice the party has no opportunity to postpone or continue the cause; but is compellable to proceed in the trial. Upon this short ground, therefore, the objection of surprise is removed from the case.

But it is by no means clear, that the matter so waived was, in point of law, a good ground of defence to the action. That depended upon the fact, whether the plaintiff made it by his specification a constituent part of his invention, that the bars should be of brass, and not of wood; for if they might be made of either, consistently with his general claim, then there was no objection to the patent in this respect. Now, the Court was by no means satisfied at the trial, that such was in fact the claim of the plaintiff. But for the purposes of the trial, the evidence was left to the Jury, as if it constituted a complete ground of defence. The Jury so acted upon it; and, having decided against it, as matter of fact, it would be a strong ground for the Court to interfere now upon a mere doubt, whether the plaintiff's claim had in point of law such an extent or not. I do not state this with any other view, than to say, that it is a matter still *sub judice*, upon which my mind is not so clear, as to induce me to grant a new trial, merely with a view to open anew the discussion of it.

But, then, as to the new evidence offered, what is its nature? It is merely cumulative; and the settled practice of this Court is never to grant a new trial upon mere cumulative evidence, where there is no other ground of objection to the verdict. That point has been fully considered in the case

of *Alsop* v. *The Commercial Insurance Company* at this term, (*ante*, p. 451.) But it has been long since established in the habitual course of proceedings of the Court. The counter affidavits, however, offered on behalf of the plaintiff, go to establish strong cumulative proofs the other way. And under such circumstances, the Court will always decline to interfere; because it will not undertake to measure the weight of the new testimony on either side, or send the parties again to litigation upon the chances of a verdict, upon new conflicting evidence. The defendants have asked, if they may put in new rebutting evidence to the affidavits of the plaintiff, offered in reply to those first offered by themselves. Certainly not. They must present their whole case at once to the Court; and not lead it on through a series of confirming and rebutting proofs, thus protracting the cause to an unreasonable extent.

There is another view, which may properly be taken of this point. The special written notice of defence by the defendants actually includes within its reach the very matter now set up as a surprise. It states, that the invention claimed by the plaintiff by his patent in 1832, "is according to the specification thereof wholly different and distinct" from the pretended invention mentioned in the patent of 1822. Of course this notice covers the whole claim of each patent; and it puts in controversy every part of the last patent, which is distinguishable from the first, and does not constitute a part of the invention claimed in the first. The defendant, therefore, was by his own special notice of defence, bound to institute all proper inquiries into the nature and actual structure of the original machine, and all the differences between that and the structure of the machine described in the patent of 1832. If he had used ordinary diligence, it is now manifest, that he might have obtained full evidence to any point, which

could properly sustain the defence. He came to the trial, content with the preparation and the points, to which his evidence actually led him; and there can be no reason for letting him into a new trial, merely because he could now, upon farther reflection and farther lights, have made a fuller or a better defence. *Interest reipublicæ ut finis esset litium*, is an old maxim deeply fixed in the fundamentals of the common law. And *Voet* beautifully expressed its true reason, when he said, "*Ne autem lites immortales essent, dum litigantes mortales sint.*[1]

The motion for a new trial is therefore overruled.

Motion overruled.

UNITED STATES *v.* SAMUEL APPLETON.

A block of buildings, consisting of a central building and two wings, was erected in 1808, with a piazza in front of the central building, and side-doors in the wings, which opened on and swung over the piazza, the upper parts of which were used as windows. The centre building was occupied by the United States as a Custom-House, under a lease from 1808 to July, 1816, when they purchased the same in fee, and have ever since been in possession thereof. The wings were sold in 1811 to other parties. *Held*, that these parties are entitled under the conveyance, independent of the lapse of time, to the use of the side-doors and windows therein, and passage therefrom, as they used them at the time of the conveyance.

Where a house or store is conveyed by the owner thereof, every thing passes which belongs to, and is in use for, the house or store, as an incident or appurtenance.

TRESPASS *quare clausum fregit.* The parties agreed to a statement of facts the substance of which is as follows: A certain block of brick buildings, situate on Custom-House Street in Boston, was erected by the owners of the land on

[1] Voet. ad Pand., Lib. 5, tit. 1, § 53, p. 328.

which it stands, in April, 1808, in the form, size, and manner, and with the doors and windows of each tenement, and the piazza in front of the central building, precisely as they now exist. The central building was designed for, and has since been used as, a Custom-House. The stores constituting the wings project several feet beyond the front of the Custom House; and each of these stores has a side-door opening on, and swinging over, a part of the piazza, in front of the Custom-House; and by means of these doors and a flight of steps of the piazza, persons can pass to and from those stores into Custom-House Street. The doors are so built as to have the upper parts thereof used as windows to furnish light, looking from the stores into and upon the piazza. From the time of the erection of the stores until the trespass complained of, the side-doors have been constantly used by the owners and occupants thereof for the purpose of passing to and from Custom-House Street, and of having light as above stated without obstruction, although each store has also a door fronting on Custom-House Street. The United States occupied the central building, as a Custom-House, under a lease from 1808 to July, 1816, when they purchased the same in fee, and have ever since been in possession thereof, using the same as a Custom-House. The owners of the block (E. Francis & Co.) sold one of the wings in April, 1811, to one John Osborne; and the other, in the same month and year, to the defendant, Appleton.

The cause was argued by *Dunlap*, District Attorney, for the plaintiffs, and by *Cooke* for the defendant. The argument of the former was as follows:

The owners of these wings claim a right to swing doors, and a right of way from these doors, over land *without their own boundaries*, and *within the boundaries of the United States*. This is the exact nature of their claim.

There are but three ways in which such an easement can be obtained. First, in a case of necessity. Secondly, in a case of prescription, founded on an *adverse* use of more than twenty years. Thirdly, by grant. 3 Cruise's Dig. 109, tit. *Ways*.

The present claim does not rest upon the ground of merit, nor of prescription. It is not a way of necessity, for the front doors of each of the wings are upon the street. It does not rest upon prescription, for the twenty years did not elapse before the commencement of the suit. And the prerogative principle *nullum tempus* applies; further, the use was merely a matter of *indulgence*, and not *adverse*. See 7 Mass. R. 385; 14 Mass. R. 33; 2 Pick. R. 466; *Medford* v. *Pratt*, 4 Pick. R. 228. The claim must rest for support on a grant.

No express grant *in terms* of a right to swing the doors, &c., and pass from the wings over the piazza is pretended. But these rights, it is contended, were *appurtenances*, and pass with the estates, whether the deed contains the word "appurtenances" or not, as part and parcel of the estates granted. This is the very question, whether there ever existed any such easements as those now claimed, as *appurtenances* to these wings. It is denied, that there ever were any such appurtenances to the wing estates. The original owners built the whole centre building and wings. Did they own the wings with the *appurtenances* of these easements in the centre lot? Clearly not. The whole was one lot, one estate, and one ownership. A man with a house and an adjoining field, does not own a right of way in that field; he owns the whole field. To test this more strongly: suppose there had been a right of way expressly granted and annexed to these wings, over the centre lot; suppose E. Francis & Co. to have become the owners of the wings, with the appurtenances;

suppose further, that Francis & Co. had afterwards bought the centre lot. Now, what could have become of the *appurtenances* to the wings? They would have vanished by the union of the right of property in the fee, with the right to the easement; a merger would have taken place. Coke Litt. 114, *B.* *Cooper* v. *Barber*, 3 Taunt. R. 99; 2 Black. Comm. ch. 11.

The foundation of the claim, on the part of the proprietors of the wings, is, that the grantor once had the right; they claim, that they may have his estates with the *appurtenances*. The answer is, the grantor of the wings had the right, not as *appurtenances* to the wings, but because he owned the centre and the whole. The United States now have all his rights in the centre lot.

What is an *appurtenance*? It is something annexed to "another thing *more worthy*"; that is, an easement estate *less* than the estate to which it is appendant or appurtenant. How were Francis & Co., when owners of the whole and standing on the piazza, owning and enjoying a *less* estate, or a less *worthy* estate, than when standing inside the doors of the wings? Their estates were equal and the same, the fee in all the lots, *wings* and *centre*. There were, then, no such things legally existing, as the *appurtenances* claimed, and *could not have been*, when the whole was under one owner. Consequently, when the estates in the wings were leased out, there could have been no rights in the grantees to swing doors, and rights of way, unless expressly *created* and granted.

A few familiar examples are offered to illustrate the argument. A owns black acre and white acre; he makes a gate or a stile to pass from one field to another. He conveys black acre, with all the privileges and appurtenances. The grantee surely cannot say to the grantor, I have all the rights and privileges, and enjoyments which you had; and one of

your enjoyments was, to pass through the gate, or over the stile, into white acre. Again; suppose in the case last put the owner of black and white acre, with the gate or stile, conveys at the same time, and by one deed, black acre to A, and white acre to B; let A and B the next day, the several grantees, meet on the stile; which of them shall yield or give back? Again; a man has a house and yard, and behind them a garden, which he is in the habit of entering by a gate from his yard. He conveys the house and yard by boundary lines; the right to open that gate into the garden and pass there, is not conveyed under the word "appurtenances." Yet the owner built the gate, as the doors to the wings were built, and used the garden as freely as the owners did or could have used the piazza, when they were the owners of the whole estate. *Barker* v. *Clark*, 4 N. H. R. 380; *Grant* v. *Chase*, 17 Mass. R. 442.

The cases, *Story* v. *Odin*, 12 Mass. R. 160; *Nicholas* v. *Chamberlain*, Cro. Jac. R. 120; *Staples* v. *Hayden*, 6 Mod. R. 4; *S. C.* 2 Ld. Raym. R. 922, are clearly distinguishable from the present.

Great stress is laid upon the continued use of this indulgence, as furnishing an exposition of the construction of the deeds. It is supposed, that but little advantage can reasonably be made on that account. Had the piazza been the ornamental entrance to a private mansion, those doors would not have been permitted a moment. But the building being in a great measure public, though not like the street public property, the doors in the wings produced no inconvenience; nor did the ingress to, or the egress from, the wings produce any. Hence the *indulgence* has been permitted, which is now contended for as a *right*, and which as a *right* is resisted. If there is any question, whether the possession be adverse or not, *that should go to a jury.* No adverse possession is admitted.

The argument of *Cooke*, for the defendant, was as follows:

1st. The defendant acquired the legal right to use the *door* and *way* in question, by the *express terms* of his *grant* in 1811, April 5th, under the words, "*the store with all the privileges and appurtenances.*" "Appendant or appurtenant is a thing used with, and related to, or dependent upon, another thing, more worthy in its nature and quality than the thing whereunto it is appendant." Coke Lit. 121, b. 122. If, then, a *door*, and a privilege of passing out of a door, may be considered a thing used with, and related to, a store, then the door in question passed by the *express words of the grant.* But it is not even necessary the words "privileges and appurtenances" should be used to pass the right of way, if it *was in existence*, and used as such, at the *time of the grant.* "In the construction of a grant, the Court will take into consideration the *circumstances* attending the *transaction* and the *particular situation* of the parties, and state of the country, and the *thing granted*, for the purpose of ascertaining the probable intent of the parties."[1]

In *Fowle* v. *Bigelow*, 10 Mass. R. 379, the Supreme Court actually admitted parol testimony to show the existence of a gate *at the time of the grant*, in order to give such a construction of the *grant*, as would give *a right of way.* See *Leland* v. *Stone*, 10 Mass. R. 459; *Kent* v. *Waite*, 10 Pick. R. 141; *Nicholas* v. *Chamberlain*, Cro. Jac. R. 121; *Whitney* v. *Olmstead*, Ib. 284; *Staples* v. *Hayden*, 6 Mod. R. 4; *S. C.* 2 Ld. Raym. R. 922; 3 Kent's Comm. 338; *Grant* v. *Chase*, 17 Mass. R. 447. I have, heretofore, endeavoured to maintain the defendant's right to the use of the door and way, upon the legal *effect and operation* of the *express terms of his grant.*

[1] Bigelow's Dig. Com. S. 5.

2d. The defendant has acquired the right to the use of said door, both as a door and a window, under what is legally called an implied grant, or an implied covenant of the grantor, resulting from the nature and character of the thing granted, that the grantor would not derogate from his own grant. See *Compton* v. *Richards*, 1 Bin. R. 36–38; *Swansboro* v. *Coventry*, 9 Bingh. R. 305; Woolrich's Treatise on the Law of Window Lights, 60, 61, 39; *Story* v. *Odin*, 12 Mass. R. 160; *Parker* v. *Smith*, 17 Mass. R. 415.

3d. The defendant has acquired a right to the use of the door and way by more than twenty years' exclusive enjoyment.

This Court, in *Tyler* v. *Wilkinson*, 4 Mason R. 402, states, that "By our law, upon the principles of public convenience, the term of twenty years of exclusive enjoyment, has been held a conclusive presumption of a grant or right."

The defendant's case comes precisely within this principle. The facts find the erection of the block in 1808, and at that time a lease of the Custom-House to the United States, and an uninterrupted enjoyment since. And here I admit the enjoyment must be adverse, and not by consent or permission; but the facts in the case show a clear *adverse possession*. The United States first entered under their lease, as the case finds, in 1808, and here then was the commencement of a *clear adverse possession* under an adverse title; and the case shows that the nature of this possession has not been changed or altered; and, if so, the twenty years elapsed so long ago as the year 1828. If the use was by consent, the burden is on the plaintiff. But supposing the adverse possession must be considered as commencing on the 12th of April, 1811, when our grant commenced; we are still within the limited time, the first writ being served on the 8th of April, 1831, four days before the twenty years would have elapsed.

In order to afford a presumption of grant, as the law now is, a use for twenty full years is not now necessary. Indeed, if it was, the four days necessary to complete the time in the present case would hardly be considered. *Bealy* v. *Shaw*, 6 East R. 215, is the leading case, and the opinion of Lord *Ellenborough* is as follows: "I take it that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of a grant; but less than twenty years may, or may not, afford such presumption, according as it is attended with other circumstances, to support or rebut the right." What, then, are the circumstances calculated to support this right? See *Haight* v. *Morris Aqueduct Company*, 4 Wash. Cir. C. R. 607; Angell on Water-Courses, p. 84, 2d edition;. *Ricard* v. *Williams*, 7 Wheaton, 59. 2 Selw. Nisi Pri. R. 506, (Wheat. edit.)

4th. Here was such a *dedication* of the "*locus in quo*," as forms a complete defence to this action of trespass. I say, such a dedication, because it is now settled there may be a partial or limited dedication, (Woolrich on the Law of Ways, pp. 13, 33,) which is a complete defence to an action of trespass; and it is sufficient for my purpose to show there has been a partial or limited dedication or license. What are the facts? The building was erected for a Custom-House; hired and purchased for the express purpose of being dedicated to that use. It has been dedicated by a use of near thirty years. It has become, as its name purports, the Custom-House of the United States, for all the citizens of the United States. Indeed, on this state of facts, it would be easy to maintain the ground of a complete and unlimited dedication to the public. In *Rex* v. *Lloyd*, 1 Campb. R. 266, the Court say: "If the owner of soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing over

it by positive prohibition, he shall be presumed to have dedicated it to the public." Same principle in *Roberts* v. *Karr*, 1 Campb. R. 262, *n.* Here we meet with no embarrassment, as to the time of dedication; it has now been used for near thirty years, and it has even been held, that a use for *six years* was sufficient to found the presumption of dedication. *Trustees of Rugby Charity* v. *Merryweather*, 11 East R. 376; *Jarvis* v. *Dean*, 3 Bing. R. 447; *Rex* v. *Barr*, 4 Campb. R. 16.

Story J. The question is, whether the defendant, Appleton, in virtue of the conveyance to him, is entitled to swing the side-door of his store over the piazza of the Custom-House, and to pass in and out of his store through that side-door into Custom-House Street. In other words, is he entitled to the use of that door and the piazza, as a passage from and to Custom-House Street?

It appears to me, that upon principle and authority he is so entitled. The general rule of law is, that when a house or store is conveyed by the owner thereof, every thing then belonging to, and in use for, the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession. But it is strictly a question, what passes by the grant. Thus, if a man sells a mill, which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of the grant, the owner of all the stream above and below the mill. And it will make no difference, that the mill was once another person's; and that the adverse right to use the stream

had been acquired by the former owner, and might have been afterwards extinguished by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to the grant; and passes with the property all those easements and privileges, which at the time belong to it, and are in use as appurtenances. Mr. Justice *Doddridge*, in *Surrey* v. *Pigot*, (Popham R. 166,) put the very case. "A man," (said he,) "owns a mill, and afterwards purchases the land, upon which the stream goes, which runs to the mill, and afterwards aliens the mill; the water-course remains." Let us take another case. A man sells a dwelling-house with windows then looking into his own adjacent lands. There can be no doubt, that the grant carries with it the right to the enjoyment of the light of those windows; and that the grantor cannot, by building on his adjacent land, entitle himself to obstruct the light, or close up the windows. Mr. Justice *Bayley*, in a very late case, put the very illustration. "If," (said he,) "I have a house surrounded by my land, and sell the house, I sell the right to light from the windows. The sale of the house, as it stands, gives a right to the light coming in at the windows, *without necessity* for twenty years' possession of the easement."[1] He also put another case: "Suppose," (said he,) "the owner of two fields sells one, having a stream of water flowing through it; can the vendee stop that water-course? *Primâ facie* no exception in the conveyance could be presumed."[2] This is the converse case; for here the law gives a common-sense construction to the grant, and supposes, that each field has the appurtenances thereof *in statu quo*, notwithstanding the grant.

It has been very correctly stated at the bar, that in the construction of grants the Court ought to take into considera-

[1] *Canham* v. *Fisk*, 2 Tyrwhitt R. 155, 157. [2] Ibid.

tion the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties.[1] In truth, every grant of a thing naturally and necessarily imports a grant of it, as it actually exists, unless the contrary is provided for. Here, the side-door in question was in actual use, as an appurtenance *de facto*, at the time of the grant. Could the owners of the central building on the next day after have shut it? Could they have shut out all the light of the window in the upper part of it? Could they have built down to Custom-House Street, and filled up the piazza? In my opinion it is most clear, that they could not. Their grant carried by necessary implication a right to the door and window, and the passage, as it had been, and as it then was, used. The case of *Nicholas* v. *Chamberlain* (Cro. Jac. R. 121) is in point. So is the case of *Staples* v. *Hayden*, (6 Mod. R. 1, 4,) notwithstanding the criticism, which has been passed upon it at the bar. There, the third point decided by the Court was, that "If one be seised of Blackacre and Whiteacre, and use a way over Whiteacre from Blackacre to a mill, river, &c., and he grant Blackacre to B, with all the ways, easements, &c., the grantee shall have the same conveniency that the grantor had, while he had Blackacre." The report of the same case, in 2 Ld. Raym. R. 922, is quite imperfect, and far less satisfactory. And Mr. Chancellor *Kent*, in his learned Commentaries, fully sustains the doctrine in 6 Mod. R. 4.[2]

It is observable, that in this case reliance is placed on the language of the grant, "with all the ways," &c. But this is

[1] Bigelow's Dig., Conveyance, S. p. 211.

[2] 3 Kent's Comm., Lect. 51, p. 420, (2d edition.)

wholly unnecessary; for whatever are properly incidents and appurtenances of the grant will pass without the word "appurtenances," by mere operation of law. So, it is laid down by Lord *Coke* in Co. Litt. 307. The same doctrine is affirmed by Lord Chief Baron *Comyns*;[1] and it has been fully supported by the Supreme Court of Massachusetts in a very recent case.[2]

The doctrine of the same Court also in the cases of *Grant* v. *Chase*, (17 Mass. R. 443, 447, 448,) and *Story* v. *Odin*, (12 Mass. R. 157,) especially the latter, appears to me fully to support my present opinion. The question is not indeed new to me; for I had occasion in the case of *Hazard* v. *Robinson*, (3 Mason R. 272,) to examine the subject at large. I adhere to the doctrine stated in that opinion, which covers the whole ground of the present question.

If there had been any doubt upon the conveyance, which I think there is not, the subsequent usage would, in my judgment, be conclusive, as to the construction put upon the conveyance by all the parties in interest.

My opinion, therefore, is, that judgment upon the statement of facts ought to be for the defendant.

[1] Comyns' Dig., Grant, E. 11.

[2] *Kent* v. *Waite*, 10 Pick. R. 138.

WILLIAM BRIGGS, IN EQUITY, v. ARTHUR FRENCH.

In a case of asserted fraud, or constructive trust, created by operation of law, the jurisdiction of a Court of Equity is sustainable, where the person can be found, although the lands to be affected by the decree are not within the jurisdiction of the Court.

A Court of Equity has jurisdiction in a case, where relief is sought against a meditated fraud, which throws a cloud over the title of a party.

BILL in Equity. The bill set out a fraudulent attachment and levy of the defendant, by a contrivance with his debtor, upon land sold by the latter to the plaintiff, situate in New Hampshire, before the deed of conveyance to the plaintiff was recorded, and charged the defendant with full notice of all the facts. The bi l prayed, that the defendant may by injunction be restrained from selling or conveying the land; that the levy may be declared fraudulent; that the defendant may release his claim with warranty against all acts done by him; and that the plaintiff may be quieted in his present possession of the premises. Demurrer to the bill for want of equity, "because the complainant had not by his bill made out such a case, as entitled him, in this Court of Equity, to any discovery or relief."

The demurrer, being set down for argument, was argued by *Fletcher* for the defendant; and *J. Mason*, in reply, was stopped by the Court.

STORY J. I am very clear, that the demurrer must be overruled. This is a case of relief sought against a meditated fraud to the injury of the plaintiff, which throws a cloud over his title, and which he has a right to have removed.

It is objected, in the first place, that the suit is purely local, and can be properly brought only in New Hampshire, where the land lies. And the case of *Massie* v. *Watts*, (6 Cranch R. 148, 158,) is relied on in support of the objection. I

subscribe entirely to the doctrine there stated by Mr. Chief Justice *Marshall*. "Was this cause, therefore," (said he,) "to be considered as involving a naked question of title, &c., the jurisdiction, &c. would not be sustained. But where the question changes its character; where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title, acquired by any species of *mala fides* practised on the plaintiff; the principles of a Court of Equity give the court jurisdiction, wherever the person may be found. And the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point, on which the case depends, does not seem sufficient to arrest the jurisdiction." And he afterwards added: "This Court is of opinion, that in a case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable, wherever the person be found, although lands, not within the jurisdiction of that Court, may be affected by the decree." Now, the present case falls precisely within one of the cases here stated. It is a case of asserted fraud, or of a constructive trust created by operation of law.

Then it is objected, in the next place, that the bill asserts, that the title of the defendant being fraudulent is *ipso facto* void; and therefore his remedy is at law; and he has no standing in a Court of Equity. But a Court of Equity has a clear concurrent jurisdiction with courts of law in cases of fraud. Besides; here the bill goes for a discovery, and other equitable relief, which cannot be obtained by a suit at law. The plaintiff is in possession, and cannot sue at law. His only remedy is in Equity. He seeks to remove out of his way a title, fraudulent in its nature, which obstructs his own title; and he seeks a declaration from the Court, that it is fraudulent; and that the fraudulent party shall execute a

release. There doubtless are cases, where a Court of Equity will dismiss the bill, and leave the plaintiff to his remedy at law, when the title of the defendant is void at law. And the very case of *Welby* v. *The Duke of Rutland*, (2 Bro. Parl. Cas. 39,) which is cited by the defendant, shows, that there are exceptions to the rule. In the case of *Hamilton* v. *Cummings*, (1 Johns. Ch. R. 517,) Mr. Chancellor *Kent* thought, that an instrument void in itself might yet properly be decreed to be delivered up by a Court of Chancery, as an instrument injurious to the party. In *Peirsol* v. *Elliot*, (6 Peters R. 95,) the subject was a good deal considered in the Supreme Court of the United States; and the result certainly was in favor of the jurisdiction, where the title had not been declared void, and was not void on the face of the instrument. The doctrine applies directly to the present case. The demurrer is therefore overruled.

JOSIAH WOOD, JR., IN EQUITY,

v.

SAMUEL H. MANN AND OTHERS.

Where a bill in Equity was brought to set aside a conveyance asserted to have been procured by fraud, and one of the defendants pleaded, that he was a *bonâ fide* purchaser under the grantee of parcel of the premises, without notice of the asserted fraud, and that he had paid a part of the consideration money, and that the residue was secured by mortgage; *Held*, that this plea furnished no bar to the bill; that it should have averred, that the whole consideration of the purchase had been paid before notice of the plaintiff's title.

The above plea overruled absolutely, and the party ordered to answer generally.

A *bonâ fide* purchaser, for a valuable consideration, and without notice, under a fraudulent grantee, would hold the estate at law against the original grantor.

Query, whether a *bonâ fide* purchase, for a valuable consideration, without notice, is a good bar in Equity to a legal title asserted; as it is to an equitable title.

The following was the denial in the plea of the notice of the fraud asserted in the bill; namely, "that this defendant had no notice whatever of any title, claim, or demand of the complainant, or of any other person, to or in the lands so purchased

by this defendant, as aforesaid, which would affect the same, or any of them, or any part thereof." *Held*, that this is argumentative and insufficient. It should expressly and in terms deny, by proper averments, notice of the fraud charged in the bill.

The bill charged notice of the asserted fraud against one of the defendants, in general terms, to wit, "that the defendant then and there well knowing all and singular the premises," &c. *Held*, that the bill should be amended so as to charge the notice more directly.

BILL in Equity to set aside a certain conveyance, made by the plaintiff to one John R. Adams, (a defendant,) asserted to have been procured by fraud and imposition upon the plaintiff. The bill averred, that Elisha Fuller, one of the defendants, had notice of the alleged fraud and imposition, in the following terms; namely, "the said Fuller *then and there well knowing all and singular the premises, and combining* and confederating as aforesaid, the nominal consideration of the said deed, being stated to be forty thousand dollars; but what consideration, or whether any consideration, was paid therefor by the said Fuller, your orator knows not; and the said Fuller combining and confederating as aforesaid, *well knowing all the premises*," &c. Fuller pleaded, that he was a *bonâ fide* purchaser under Mann of parcel of the premises, without notice of the asserted fraud or imposition; that he had paid a part of the consideration money, and that the residue was secured by a mortgage. Upon motion of the plaintiff, the plea was set down for argument, as to its validity in matter as well as in form; and the questions were argued by *Rand* for the plaintiff, and by *Washburn* for the defendant, Fuller.

STORY J. The first question made at the bar is, whether, if the plaintiff asserts a legal title, the plea of a *bonâ fide* purchase for a valuable consideration, without notice, is a good bar in equity to a bill, like the present, which is for discovery and relief. Without doubt, a plea to the whole bill,

which is bad in part, and good in part, may be allowed to the extent, to which it is good; and overruled as to the residue. It may be good as to the discovery, and bad as to the relief.[1] Upon the question, whether a *bonâ fide* purchase for a valuable consideration, without notice, is a good plea in bar to a legal title asserted, as it certainly is to an equitable title, there is considerable contrariety in the authorities. Lord *Nottingham* is reported, in the case of *Burlase* v. *Cooke*, (2 Freeman R. 24,) to have held the plea to be a good bar. But he is said, in the subsequent case of *Rogers* v. *Seale*, (2 Freeman R. 84,) to have changed his opinion. Both these cases, however, are, as Mr. *Sugden* has well observed, very ill reported.[2] In *Parker* v. *Blythmore*, (2 Eq. Abridg. G. p. 79; *S. C.* Prec. Ch. 58,) the Master of the Rolls held the plea good. Afterwards, in *Williams* v. *Lambe*, (3 Brown Ch. R. 264,) Lord *Thurlow* held the plea bad to a bill for discovery and relief. And in the later case of *Jerrard* v. *Saunders* (2 Ves. Jr. R. 453) Lord *Loughborough* held the plea good, adhering to, and approving, the doctrine of Lord *Nottingham* in the case of *Bassett* v. *Nesworthy* (Finch R. 102). The elementary Writers, too, on this subject are as ill agreed, as to the result of the authorities; Mr. *Sugden* adopting one view, and Mr. *Belt* and Mr. *Beames* another.[3] Mr. Chancellor *Kent* has come to the conclusion, that the rule in England is according to the decision of Lord *Thurlow*.[4] If it were material to decide this point in the present case, I

[1] See Cooper Eq. Plead. 230. Mitf. Plead., (4th edit. by Jeremy,) pp. 294, 295.

[2] Sugden on Vendors, 762, (7th edition.)

[3] Sugden on Vendors, 762, 763, (7th edition.) Belt's note to 3 Brown, Ch. R. 263. Beames' Plead. in Equity, 234, 245.

[4] *Methodist Episcopal Church* v. *Jaques*, 1 Johns. Ch. R. 74.

should take more time to consider it. It appears to me, that some of the cases admit of distinctions, which may reconcile them. There may be good ground to refuse a discovery against such a purchaser, when the bill might be maintainable for relief. And there may also be good ground not to interfere with such a purchaser, so far as to take from him any paramount legal title, which he has honestly obtained; and yet, when that title is not paramount to the legal title of the plaintiff, to give him full relief. The case of dower before Lord *Thurlow* may stand upon this distinction; and perhaps others. But it is, in my judgment, wholly unnecessary to decide the point; and therefore I leave it for farther consideration.[1]

The groundwork of the argument here fails; for it is not true, that the plaintiff does assert a title strictly legal in all aspects of the case. The argument insists, that the conveyance of the plaintiff to Adams was a mere nullity; not voidable, but utterly void. But, however it may be treated as between the original parties, in a loose and general sense, as a nullity, it is not so in fact, or in law. The title was voidable for the fraud; and not void. A *bonâ fide* purchaser, for a valuable consideration, and without notice, under the fraudulent grantee, would hold the estate at law against the original grantor. That doctrine has been repeatedly affirmed by this Court; and particularly in the case of *Bean* v. *Smith*, (2 Mason R. 252, 272, &c.) It has more recently been fully sanctioned by the Supreme Court of Massachusetts in *Somes* v. *Brewer*, (2 Pick. R. 184.) So that, according to the well-established doctrine in this Commonwealth, the deed of the plaintiff to

[1] See *Rancliffe* v. *Parkyns*, 6 Dow R. 149, 230. *Walwyn* v. *Lee*, 9 Ves. 24. *Strode* v. *Blackmore*, 3 Ves. R. 211.

Adams cannot be treated as utterly void, but as voidable only.[1]

Resort, then, is now had to a Court of Equity, not to enforce a legal title, but to obtain a declaration, that the original deed was fraudulently obtained, and of course to procure from the defendant, Fuller, a re-conveyance, if he purchased with notice, as the bill asserts in general terms that he did. The plaintiff asks for a discovery, which itself is equitable relief, for the purpose of having a surrender of the asserted fraudulent titles of the defendants, which is also equitable relief. Whatever, then, may be the case, as to a purely legal title asserted in a Court of Equity, it does not strike me, that this can be treated as a case of that sort upon the actual structure of the bill and plea.

But it is very clear, that the plea furnishes no bar to the bill. In order to make it a good bar, it is necessary, that it should aver, that the whole consideration of the purchase had been paid before notice of the plaintiff's title. Now, the plea admits, that part of the purchase money has been paid, and that the residue is unpaid. It is plain, then, upon the unshaken doctrine of the authorities, that the plea is bad. Lord *Redesdale* has laid down this doctrine in full and exact terms in his excellent work on Pleadings in Equity. Speaking upon the subject of a plea of this sort by a purchaser, he says: "It (the plea) must aver the consideration and actual payment of it; a consideration secured to be paid is not sufficient."[2] And he is fully borne out by authority. *Hardingham* v. *Nicholls* (3 Atk. 304) is directly in point; and indeed

[1] See *Ricket* v. *Salway*, 2 Barn. & Ald. R. 360. *Fletcher* v. *Peck*, 6 Cranch R. 133.

[2] Mitford's Pleadings, 4th edition, by Jeremy, p. 275. Cooper's Eq. Pleadings, 282.

the doctrine has passed into a common axiom of equitable jurisprudence.[1] Therefore I have no doubt, that the plea must be overruled. And the only question, then, will be, whether it should be overruled generally, or should be permitted to stand for an answer, with liberty to the plaintiff to except; for without such liberty, it would be establishing it as a good answer;[2] or whether the benefit thereof should be reserved to the hearing of the cause, to avail, *quantum valere possit.* Lord *Redesdale* has fully stated the appropriate effect of each of these courses: "If," (says he,) "upon argument the benefit of a plea is saved to the hearing, it is considered, that, so far as appears to the Court, it may be a defence; but that there may be matter disclosed in the evidence, which would avoid it, supposing the matter pleaded to be strictly true; and the Court, therefore, will not preclude the question. Where a plea is ordered to stand for an answer, it is merely determined, that it contains matter, which may be a defence, or part of a defence; but that it is not a full defence; or it has been informally offered by way of plea; or it has not been properly supported by answers, so that the truth of it is doubtful."[3] The same doctrine was held by Mr. Chancellor *Walworth* in *Orcutt* v. *Ormes,* (3 Paige R. 459.)

It appears to me, that the proper course in the present case is, to overrule the plea absolutely, and to order the party to answer generally; in which case he may insist upon the same

[1] *Harrison* v. *Southcote,* 1 Atk. R. 538. *Story* v. *Lord Windsor,* 2 Atk. 630. *Jewett* v. *Palmer,* 7 Johns. Ch. R. 65. *Wormley* v. *Wormley,* 8 Wheat. R. 449.

[2] *Maitland* v. *Wilson,* 3 Atk. R. 813. *Sellon* v. *Lewen,* 3 P. W. R. 239.

[3] Mitford's Pleadings in Eq. p. 303, 4th edition, by Jeremy. See also 1 Turner & Ven. Pr. p. 826, (6th edition.)

matters of defence by way of answer, and have the full benefit of them. The matter of the plea does not furnish a complete bar to the bill; for even if the title in the defendant, Fuller, is unimpeachable, because he had no notice of the fraud or imposition; still, as the whole purchase money has not been paid, the plaintiff may be entitled to relief to the extent of the unpaid purchase money. It is unnecessary now to decide, whether, if the defendant stands in the predicament of a *bonâ fide* purchaser without notice, having paid part of the purchase money, the deed to him can be set wholly aside, or set aside *pro tanto*; or whether the remedy of the plaintiff against him is to have the residue of the purchase money paid over to him, if, upon the full hearing of the cause, the plaintiff establishes the case, as put forth in his bill. The other parties have an interest in the decision of these points; and therefore they should be reserved to the hearing.

But what is with me decisive for overruling the plea is, that it does not expressly and in terms deny, by proper averments, notice of the fraud and imposition, which are charged in the bill, and of which, (though in a very loose and inartificial manner,) the defendant, Fuller, is charged by the bill as having notice. It is clear, by the authorities, that it is not sufficient to deny generally notice of such facts, so charged, in the answer in support of the plea; but the answer must deny them specially and particularly, as charged in the bill. This was the decision of Lord *Hardwicke* in *Redford* v. *Wilson*, (3 Atk. R. 815,) and it has been constantly adhered to, as undoubted law.[1] It is true, that the plea need not be

[1] See Mitford on Plead., p. 276, (4th edition, by Jeremy.) Cooper's Eq. Plead., p. 283, [238, 239.] Beames's Plead. in Eq., p. 247. *Jerrard* v. *Saunders*, 2 Ves. Jr. R. 187. *S. C.* 4 Brown Ch. R. 322. *Senhouse* v. *Earl*, 2 Ves. R. 450. Willis's Plead. in Eq., p. 568, note. Sugden on Vendors, p. 761, (7th edition.) *Rancliff* v. *Parkyns*, 6 Dow R. 230.

so particular as the answer in support of it. But still it must generally by proper averments deny notice of the fraud and imposition, otherwise the fact of fraud and imposition will not be in issue.[1] The case of *Pennington* v. *Beachey* (2 Sim. & Stuart R. 282) fully supports this distinction. The Vice-Chancellor on that occasion said: "It is not the office of a plea to deny particular facts, even if such particular facts are charged." At the same time he held, that there must be a general denial of notice in the plea, and special denial of the particular facts in the answer in support of the plea. But I think the averment of the plea, in this case, is too argumentative, and not sufficiently pointed. It is, "that this defendant had no notice whatever of any title, claim, or demand of the complainant, or of any other person, to or in the lands so purchased by this defendant, as aforesaid, which would affect the same or any of them, or any part thereof." Now this is no denial of notice of the asserted fraud and imposition; but it is merely *arguendo*, that he had no notice of any title, &c., in the lands, which could affect the same. How can the Court say, until it knows, what facts he had notice of, whether they would affect the title or not? The averment contains a denial of matters of law, and not of matters of fact.[2]

I have the less hesitation in overruling the plea absolutely on this account, because if it were permitted to stand for an answer with liberty to except, it would be defective, and upon exceptions must be amended. And no difficulty will

[1] Ibid.

[2] See Cooper's Eq. Plead., p. 283. Mitford's Eq. Plead., pp. 286, 287, (4th edition, by Jeremy.) *Jerrard* v. *Saunders*, 2 Ves. Jr. R. 187. *S. C.* 4 Brown Ch. R. 322. *Claridge* v. *Hoare*, 14 Ves. R. 59, 66.

occur in stating fully, by way of answer, all the matters, which may establish the defence. At the same time I am satisfied, that the bill requires amendment, so as to charge the notice more directly; and the answer should meet the allegations more distinctly.

Plea overruled.

JOHN CROSBY, JR.

v.

PHILIP P. FOLGER AND OTHERS.

In a case of tort, several costs of travel, attendance, and attorney's fees will be allowed to several defendants, whether the pleadings are joint or several.

THE action was trover against four persons. No pleas were filed until October Term, 1833; no motion or call was made by the plaintiffs for pleas; and no objection was made to the pleas, when filed by the plaintiffs.

The cause proceeded to the Jury, and the plaintiffs went through their side of the cause. The defendants stated their case, and put in some of their evidence, when the Court intimated an opinion against the plaintiffs, and they became nonsuit.

The defendants now moved for *several* costs of travel, and attendance, and attorney's fees. They claimed them under the authority of a case decided in Massachusetts, (*Mason* v. *Waite*, 1 Pick. R. 452,) which they thought settled this case.

The plaintiff's Counsel objected to the allowance of several costs at all; and at least, they said, they could not be allowed before the pleas were actually filed.

THE COURT, upon the authority of *Mason* v. *Waite*, (1 Pick. R. 452,) directed several costs to be allowed to the defendants. They thought it made no difference in a case of tort, whether the pleadings were joint or several, as to costs.[1]

Hubbard and *Webster* for plaintiff.

C. P. Curtis for defendants.

[1] See *Brown* v. *Stearns*, 13 Mass. R. 536.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1834, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

The Schooner Nymph, Bibbord Claimant.

Since the Act of 1828, ch. 109, the mackerel fishery cannot be lawfully carried on under a license for the cod fishery, in pursuance of the Act of 1793, ch. 52, § 32.

Semble, that before the Act of 1828 it could not be carried on under such a license, unless so far as it was an incident to the cod fishery; as, for instance, for bait, or provisions for the crew.

The cod fishery is a trade within the true intent and meaning of the 32d section of the Act of 1793, ch. 52. So is the mackerel fishery. "Trade" in the Act is used as equivalent to occupation, employment, or business, for gain or profit.

This was the case of a libel of seizure against the Nymph, a vessel licensed for the cod fisheries. And the charges were: (1st.) That during the continuance of the license the schooner was employed in a trade other than that, for which she was licensed, contrary to the 32d section of the Coasting Act of 1793, ch. 52, (8); (2d.) That during the same period she proceeded on a foreign voyage, without first giving up her enrolment and license, contrary to the 8th section of the

same Act. The District Court pronounced a decree of acquittal upon the facts; and from that decree the United States appealed to this Court.

The cause was argued at this term by *Anderson*, District Attorney, for the United States, and by *C. S. Davis* for the claimant.

Story J. There are in this case two points; one of law, upon which, having been fully argued, the Court will now pronounce its opinion; and the other of fact, which will be open for argument at a future term, if in the mean time the cause is not otherwise disposed of. The schooner was duly licensed in October, 1832, to be employed in the cod fishery, pursuant to the Coasting and Fishery Act of 1793, ch. 52. And the allegation made at the bar is, that she was during the existence of that license employed in the mackerel fishery, which, it is contended, is a trade other than that for which she was licensed; and consequently, that she is subjected to forfeiture under the 32d section of the Act. Assuming, that she was so employed in the mackerel fishery, it is contended; first, that the mackerel fishery is not a trade within the meaning of the 32d section of the Act; and, secondly, that if it be, still the license for the cod fishery includes the right to be employed in the mackerel fishery.

The 32d section declares, that if any licensed ship or vessel "shall be employed in any other *trade* than that, for which she is licensed," she, with her tackle, &c. shall be forfeited. And the first question is, in what sense the word "trade" is used in this section. The argument for the claimant insists, that "trade" is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word "trade" is often

and, indeed, generally used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*. Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoe-maker, though some of these may be, and sometimes are, carried on without buying or selling goods. It is in this extended sense, that the word was understood in construing this very section by the Circuit Court in the case of *The Boat Eliza*, (2 Gall. R. 4, 9,) and by the Supreme Court in the case of *The Sloop Active*, (7 Cranch R. 100, 106.) In neither of these cases was the vessel employed in traffic in the strictest sense; but merely in the transportation of merchandise on freight, or for hire.[1] But the Act itself furnishes abundant proof, that "trade" in the 32d section is used in the more enlarged sense already alluded to; and indeed this is the only sense, which will satisfy the requisitions of the Act. We are not to enlarge penal Statutes by implication, so as to cover cases within the same mischiefs, though not within the words. But, on the other hand, we are to ascertain the true legislative sense of the words used; and that sense being once ascertained, Courts of justice are bound to give effect to that intent, and are not at liberty to fritter it upon metaphysical niceties. The very words of the 32d section show, that "trade" must there mean something more than mere traffic in goods or commercial buying and selling. The words are, "if any such ship or vessel shall be em-

[1] See Comyn's Digest, *Trade*, A. D. 5. 2 Co. Instit. 621, 668.

[2] See also *The Schooner Two Friends*, 1 Gall. R. 118. *The Schooner Three Brothers*, Ib. 142.

ployed in any *other* trade, than that for which she is licensed." It is then supposed, that she is to be licensed for some trade, and that she may be employed in another trade. The only cases, in which a license is authorized and required, are for vessels to be employed in the coasting trade, or the whale fishery, or the cod fishery. The 32d section equally applies to each of these employments; and each of them is, therefore, necessarily contemplated to be a trade in the sense of the Act. Indeed the coasting trade is ordinarily not a traffic of buying and selling, but a transportation of goods for hire. And there is no more difficulty, in propriety of language, in denominating the whale fishery the whale trade, and the cod fishery the cod trade, than in denominating the coasting business the coasting trade.[1] Each embraces the same general notion, employment, occupation, or business for gain or hire, in contradistinction to employments for mere pleasure. It also deserves notice, and, in confirmation of the views already suggested, it may be added, that the Charter of Massachusetts of 1628 expressly provided, that all subjects should have the right and liberty "to use and exercise the *trade* of fishing upon the coast of New England";[2] and the Provincial Charter of 1691 recognised the same right and liberty in the same terms; thus conclusively establishing, that the very fisheries in question were significantly deemed a trade.

The very form of the license, and the other regulations prescribed by the 4th and 5th sections of the Act, prove, that trade, employment, and business are used in the Act as equivalent terms. Before a license is granted, a bond is to be given,

[1] See Reeves on Shipping, ch. 5, p. 216, &c. Bac. Abridg. *Merchant and Merchandise*, N. 5. 2 Dane Abridg. ch. 68, art. 9, § 9.

[2] 1 Haz. Collect. p. 254. Hutch. Collect. pp. 1 - 23. Ancient Charters and Laws, and Prov. Laws, p. 26. Adams on the Fisheries, (1822,) p. 185.

that the vessel "shall not be employed in any *trade*, whereby the revenue of the United States shall be defrauded." The master of the vessel is to swear or affirm, "that such license shall not be used for any vessel or any other *employment* than that, for which it is specially granted, or in any *trade* or *business* whereby the revenue of the United States may be defrauded." And "no license granted to any ship or vessel shall be considered in force any longer than such ship or vessel is owned, and of the description set forth in the license, or for carrying on any other *business* or *employment*, than that for which she is specially licensed." Taking these provisions in connexion with the language of the 32d section, it seems beyond any reasonable doubt, that the whole policy of the Act would be defeated, and its manifest intention be evaded, by any narrow definition of the word "trade." It appears to me, therefore, that unless the Court were at liberty wholly to disregard its ordinary duty in the construction of this Statute, an employment in the mackerel fishery is a "trade" within its purview.

The next question is, whether the license in the present case, for employment in the cod fishery, includes within its scope a license for a distinct employment in the mackerel fishery. Notwithstanding the ingenious and able argument of the Counsel of the claimant, I am decidedly of opinion, that it does not; and I will now proceed to give the reasons for that opinion. A license to be employed in the cod fishery, *ex vi terminorum*, cannot include any right or privilege except those, which are incident and belong to that particular branch of trade. The license confers on the party whatever is necessary and appropriate to that trade; for a right to carry on any business naturally includes all the usual and customary means, by which the end is to be accomplished. The right to dig, purchase, and use clams, or other bait, to

purchase and transport salt, and procure other reasonable equipments for the voyage, are therefore clearly within the scope of the license. And so far as mackerel are or may be used, as a customary bait in the course of the voyage, there can be as little doubt, that the right to fish for and use them for that purpose is also included. And I go farther, and freely admit, that any other fish caught in the ordinary course of the voyage, not as a substitute for employment in the cod fishery, but as a mere incident to the principal business, are equally protected by the license. We all know, that halibut, pollock, cusks, and some other fish are commonly caught in the course of such voyages, and sometimes used as provisions, and sometimes preserved for sale. The true ground, upon which all these apparent exceptions rest, is, that they are mere incidents to the principal employment, and not a distinct and separate employment. No man can justly suppose, that a license to carry on the cod fishery authorizes a party to carry on all sorts of fisheries; as, for instance, the whale fishery, the herring fishery, the shad fishery, the salmon fishery, as a principal employment. That would be to confound all distinctions of trade. It would be to declare, that although the Act of 1793 requires a license for the cod fishery, and a distinct license for the whale fishery, any person, who possessed either, could carry on both trades at the same time. Under a license to catch cod, he would be at liberty to institute and carry on a whaling voyage; or, conversely, under a whaling license, he might employ himself wholly in the cod fishery.

It is undoubtedly true, (as has been suggested at the bar,) that mackerel have for a long time been used as bait in the cod fishery, and caught in the course of the fishing voyage for this purpose. But it is also historically true, that until a recent period the mackerel fishery was carried on solely for

this purpose, or by small boats on the coast for the mere supply of the daily market. Within a few years it has become an important branch of trade; and it is carried on as a distinct employment; so that at present, as I learn from the argument at the bar, upwards of 40,000. barrels are annually taken on our coast, and put up for use and exportation. In the year 1828, the attention of Congress was attracted to this subject; and by the Act of the 24th of March, 1828, ch. 109, it was enacted, that from and after the passage of that Act, it shall be the duty of the collector, &c., "to issue a license for carrying on the mackerel fishery" to any vessel, in the form prescribed by the Coasting and Fishery Act of 1793, ch. 62; and that all the provisions of that Act, respecting licensed vessels, shall be deemed and taken to be applicable to licenses, and to vessels licensed, for carrying on the mackerel fishery. This Act must at all events, (it seems to me,) be deemed to erect the mackerel fishery into a distinct and independent employment; and to make it distinguishable and disconnected from the cod fishery. Unless this construction be given to the Act, I cannot well perceive, what bearing or operation the Act can have. If a license for the *cod fishery* will, notwithstanding this Act, cover the mackerel fishery, whether carried on in connexion with the cod fishery, or exclusive of it, what possible use can there be for any provision allowing a license for the mackerel fishery? It would be already sufficiently provided for. And, on the other hand, if the mackerel and cod fishery are to be deemed identical, then, under a license for the mackerel fishery, the cod fishery might be pursued. So that whichever way we look at the Act of 1828, it would in this view be, in a judicial sense, a mere nullity. A construction leading to such a conclusion, must be wholly unjustifiable, if any other reasonable interpretation can be given to the Act. It is certain, that cod and

mackerel are not the same fish; and that employment in the one fishery does not naturally or necessarily include the other. And if it did, still it was quite competent for the Legislature to distinguish the one from the other; to separate their character and advantages; and to allow to one, what it might well deny to the other. It cannot well be denied, that the Legislature has in fact made such a distinction. By the Act of 1813, ch. 34, Congress have allowed a bounty of twenty cents per barrel upon all pickled fish of the fisheries of the United States, exported from the United States. And they have allowed a very different bounty, according to certain rates of tonnage, to all vessels licensed and employed for certain periods in the bank and other cod fisheries. The bounty upon pickled fish belongs to the exporter; that upon the cod fishery is distributable in a given proportion between the owner and crew of the fishing vessel. It seems to me impossible to contend, that the bounty on tonnage given in the cod fishery can be applied to vessels employed in the mackerel fishery. The terms of the Act apply it to the cod fisheries, in which the fish are dried and cured for exportation. In the mackerel fishery the fish are barrelled and pickled, and not cured and dried. The irresistible conclusion is, that the mackerel and cod fishery are not identical trades; and that the Acts of Congress look to them as known and distinct trades.

It has been said, that before the Act of 1828 the mackerel fishery might be exclusively carried on under a cod-fishery license; and if so, it is still lawful, as there are no prohibitory words in that Act, which take away the privilege. The answer is, that the conclusion would not follow, if the premises were admitted; for when Congress create a distinction between things before united, that distinction must ever afterwards be respected. The severance creates a legal separation between them, so that the one cannot ever afterwards

be judicially said to be included in the other. But the premises are not in themselves admissible. A license for the cod fishery could never properly include a right to the mackerel fishery, except so far as the latter might justly be carried on as an incident to the former. It never could in a legal sense justify an employment exclusively in the mackerel fishery; nor could a vessel, exclusively employed in the mackerel fishery, ever be justly deemed employed in the cod fishery for the purpose of the bounty, or for any other purpose. If under color of a cod-fishery license, the mackerel fishery was in fact carried on, as an exclusive employment, the practice was an abuse of the license, and not a just and appropriate use of it. The practice could not establish its legal correctness. And, indeed, unless my memory misleads me, the very question came, several years ago, before the District Court in Massachusetts in some cases, where the bounty was either claimed, or had been received, and the Court pronounced against the title.

In every view, therefore, which I am able to take of the law, the defence of the claimant is unsupportable. As to the matter of fact, I propose, with the assent of the claimant's Counsel, to let the cause lie over until the next term, in order that in the mean time an application may be made to the Secretary of the Treasury for a remission, as the case is admitted not to be one for vindictive prosecution; and the principal object has been to procure a decision upon the question of law. I am not aware, that my view of the law differs in the slightest degree from the opinion of the learned Judge of the District Court.

Libel continued.

JESSE GORDON

v.

ARCHELAUS LEWIS AND THE PORTLAND MANUFACTURING COMPANY.

In order to foreclose a mortgage under the Statutes of Massachusetts of 1788, ch. 22, and of 1798, ch. 77, the mortgagee must not only enter into the mortgaged premises after the condition broken in the presence of two witnesses, but his entry must be made known to them to be for the condition broken, and to foreclose the mortgage.

Until the Statute of Massachusetts of 1818, ch. 15, there was no legal means of levying an execution on an undivided part of a mill and its appurtenances, where the execution debtor was the owner of the entirety of the mill, although a mill privilege is incapable of severance. The prior Statutes did not reach the case.

THIS is a bill in Equity to redeem certain mortgaged premises, brought by the plaintiff, as assignee of the mortgagor of the mortgaged premises, against the defendants, as assignees of the mortgagee. The bill charges, that Joshua Webb, on November 1st, 1808, mortgaged the premises to Mark Haskell; Haskell on the 31st of August, 1816, assigned the mortgage to the defendant, Lewis; and Lewis assigned the same to the Portland Manufacturing Company, on the 3d of August, 1831. It further charges, that the mortgagor, Webb, on the 14th of April, 1812, conveyed the mortgaged premises to John Gordon; and that John Gordon, on the 23d of January, 1832, conveyed the same to the plaintiff. It then alleges a tender, &c. &c., and prays an account and redemption.

The answers of the defendants admit the mortgage of the premises, excepting an old gristmill, which is said to have belonged to Jonathan Webb, and the assignment of the same mortgage, as charged in the bill. They require proof of the plaintiff's title; and then assert, as matter of defence, an

entry into the premises after condition broken, for the purpose of foreclosure by Lewis on, or from and after the 16th of August, 1816, and open, and visible, and exclusive possession by him of the same for more than three years thereafter, and until his conveyance to the Company, whereby he acquired an absolute title under such entry and foreclosure; and then denies the right to any account, &c. &c.

At the hearing, two questions arose. (1.) Whether there had been any entry for condition broken and foreclosure, as asserted in the answers; (2.) whether the defendants had shown any title to the old mill, (called the Haskell saw-mill.)

The case was argued at a former term of the Court by *Davis* for the plaintiff, and by *Longfellow* and *Greenleaf* for the defendants.

The opinion of the Court was at this term delivered as follows.

Story J. As to the first question, the Court are clearly of opinion, that the proof does not establish any sufficient entry into the premises for condition broken, so as to create a statutable bar to the bill to redeem. The Statute of Massachusetts of the 4th of November, 1788, ch. 22, declares, that all mortgaged premises shall be redeemable, "unless the mortgagee, or person claiming under him, hath by process of law, or by open and peaceable entry made in the presence of two witnesses, taken actual possession thereof, and continued that possession peaceably three years." The Statute of the 1st of March, 1798, ch. 77, declares, that where the mortgagee, &c. "have lawfully entered and obtained, or shall lawfully enter and obtain, the actual possession of such lands and tenements (the mortgaged premises) *for the condition broken*, the mortgagor, &c. shall have right to redeem the same at any time within three years after such possession obtained, and not afterwards." Taking these Statutes

together it is manifest, that an entry into the land by the mortgagee is not alone sufficient to make the time of foreclosure begin to run; but it must be after the condition broken, and *for the condition broken.* And as this is a Statute operating as a bar to an equitable right, it is not to be extended by intendment. There must be a strict compliance with all the requisites to create the foreclosure. In our judgment, it is not sufficient, that the entry has been made after the condition broken; for that may well be by the mortgagee without any intent to foreclose. But the entry must be with the intent to foreclose, or, as the phrase in the Statute is, "for the condition broken." Unless, then, the two witnesses, in whose presence the Statute requires the entry to be made, can speak to the intent of the entry, as well as to the entry itself, that it was "for condition broken," it does not come within the purview of the Statute. And in the present case, there is no proof, that it was with intent to foreclose the mortgage.

In the case of *Taylor* v. *Weld,* (5 Mass. R. 109, 119,) it is explicitly admitted by the Court, that it must be proved on the part of the mortgagee, that he did enter for condition broken. But it has been supposed, that that case establishes the doctrine, that an entry after condition broken is to be presumed to be for condition broken. In our judgment, that case establishes no such doctrine. The Court go into an elaborate examination of the facts of that case, and come to the conclusion, (with which we have nothing to do,) that, though in point of fact there was an entry after condition broken, that entry could not at that time be, under all the circumstances, deemed an entry for condition broken; but that the entry for the condition broken was at a later period. In our judgment, the mere proof of the fact of an entry after condition broken, is no proof of the purpose, for which it is made. The law requires the intent to be as notorious as the

act. Equivocal acts, which admit of different interpretations, ought to be so construed, as to preserve and not to defeat rights.

Then, as to the title to the Haskell saw-mill. It appears, that on the 5th of November, 1811, Archelaus Lewis and Stephen Thacher, as executors of Peter Thacher, brought an action against Joshua Webb, and attached the mill on the writ. At that time Webb's only title on record was a deed of one undivided half of the premises from John Quimby, dated the 27th of May, 1806. On the 1st of November, 1808, he bought the other half from Solomon and Mark Haskell, to the latter of whom he mortgaged it for the payment of certain notes. But his deed from the Haskells was not recorded until long after the attachment, namely, in March, 1817. Judgment was duly obtained in the action; and the execution was extended, in December, 1812, on three fifths of the mill in common and undivided.

Under these circumstances, it is contended on the part of the defendants, first, that if Webb is to be deemed a tenant in common of one undivided moiety of the saw-mill only, according to his title on record at the time of the levy, then that levy is good at least for that moiety; secondly, if he is to be deemed in possession of the whole mill, so that the execution creditors, (the executors,) are to be deemed to have notice of his title to the whole mill, still the levy on the three fifths of the mill is *ex necessitate rei* good. The plaintiff contends, on the other hand, that the levy is altogether void, because at the time of the levy the debtor was seised of the entirety of the mill, and not of an undivided moiety thereof.

This necessarily leads us to the consideration of the nature and mode of levies of execution on real estate according

to the laws of Massachusetts, by which the present extent must be governed, it being before the separation of Maine.

By the Provincial Act of 1692, it was declared, " that all lands and tenements belonging to any person, in his own proper right in fee simple, shall stand charged with the payment of all just debts owing by such person, as well as his personal estate, and shall be liable to be taken in execution for satisfaction of the same." The same provision was re-enacted in 1696. But the mode of levying the execution thereon was not pointed out. This was supplied, first, by an Act in 1716, and afterwards by another Act in 1719, which required the extent to be by appraisement in the mode prescribed under our present laws. And the same Acts further provided, that when it so happened, that the real estate extended upon could not be divided and set out by metes and bounds, then the execution should be extended upon the rents of such real estate, and the tenants thereof be caused to attorn to the creditor and pay their rents to him accordingly.[1] In this situation our laws remained until the revision by the Statute of the 17th of March, 1784, (Stat. 1783, ch. 57,) when it was further provided, that " when real estate of the debtor or debtors shall be held in joint tenancy, in coparcenary, or tenancy in common, with the real estate of other persons, then the officer may extend execution on such debtor or debtor's real estate, held as aforesaid, or part thereof, describing the same with as much precision as the nature and situation thereof will admit, and give the creditor, &c. seisin or possession of such debtor or debtor's real estate held as aforesaid, or part thereof, to hold in common with the said other persons." So that this Statute in effect provided for

[1] See Ancient Charters and Laws, pp. 216, 292, 401, 413, 423; and Colonial Act, 1675, ibid. p. 143.

three classes of cases; first, levies on real estate in common cases, where the estate can be set off by metes and bounds; secondly, on rents, where the estate cannot be set off by metes and bounds, or other proper description, and there is a tenant in possession to attorn; and, thirdly, levies where the estate is held in an undivided share with others.

Now, the argument for the defendants is, that the Act of 1696 still remains in full force, as to all cases of real estate, which cannot be set off in either of the modes *thus* prescribed, as is the case of a mill wholly owned by one person, where a part of it cannot be set off on one execution in severalty, as the privilege is incapable of a severance; and that the Statute of Massachusetts of the 20th of February, 1819, (Stat. 1818, ch. 115,) on this subject, is merely affirmative. But it seems to me, that the argument itself is difficult to be maintained. The Act of 1696 merely declares in general terms the liability of real estate to be taken in execution. The Act of 1719 expressly declares the manner, in which the levy shall be made, when the creditor doth "think fit to levy upon the real estate of such debtor"; so that by necessary implication the extent cannot be in any other manner. And if this were even doubtful before the Statute of 1783, ch. 57, that Statute being a revision of the whole subject, and *in pari materiâ*, operates as a virtual repeal of the antecedent laws.

If, then, the levy of Lewis and Thacher on the Haskell saw-mill can be maintained at all, it must be maintained under the Statute of 1783, ch. 57. If, at the time of that levy, Joshua Webb had been seised of an undivided moiety only of the mill, notwithstanding the extent of a greater portion, namely, three fifths, it would have been good for the moiety. And so it was held in *Atkins* v. *Bean*, (14 Mass. R. 404.) The difficulty is, that Webb was at that time owner

of the whole mill under the purchase from the Haskells, though the moiety purchased of them was under mortgage. The question, then, is, whether by law an undivided part of a mill, of which the judgment debtor is sole owner, can be set off on execution. It is said, that it can, *ex necessitate*, because the privilege is incapable of severance, and a part of the mill cannot be set off by metes and bounds; and there is no inconvenience in setting off an undivided portion of the whole, describing the whole by metes and bounds. If the question had been wholly new, and untouched by legislation or decision, I must say, that I should have been greatly distressed by the argument. The Statute certainly does contemplate the case of an extent of an undivided right or share of the debtor in real estate, *or of part thereof;* and there does not seem any very sound reason, why, if the debtor owns a moiety, one quarter part may be set off on execution, and yet, if he owns the whole, one moiety cannot, where a separate portion of the whole is incapable of severance, and of being set off by metes and bounds. Nor does the language of the Statute in its terms necessarily preclude such a construction. After declaring, that the creditor may, if he thinks proper, levy his execution upon the debtor's real estate, it proceeds to state, among other things, that the appraisers "shall set out such estate by metes and bounds," which words do not necessarily import, that the whole interest of the debtor in the lands shall be extended; but that the estate itself (that is, the land) shall be set out, that is, described by metes and bounds. And this interpretation derives strength from the succeeding clause, as to estates held in joint tenancy, &c. And the clause as to rents rather confirms than impugns it. It is: "And when it so happens, that the real estate extended upon cannot be *divided and set out by metes and bounds, as before prescribed, or by the description before*

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demanded premises. So that the case must have turned upon the validity of an extent of an undivided part, where the debtor was owner of the entirety of a mill. This decision was made in May Term, 1818. At the very next session of the Legislature, by the Act of February, 1819, (Act of 1818, ch. 15,) it was provided, "that whenever a creditor shall think proper to extend and levy the same on any saw-mill, grist-mill, or other mill factory, mill privilege, or other real estate, which cannot be divided without prejudice to or spoiling the whole, and where the whole of such saw-mill, &c. is not necessary for the satisfying of such execution, the same may be extended, in manner prescribed by law, upon the same, or upon any undivided part thereof, which shall be sufficient to satisfy the same," &c. &c. It is impossible to entertain a doubt, that this almost contemporaneous legislation grew out of the decision in the case of *Partridge and wife* v. *Gordon*. Under such circumstances it cannot be correctly deemed to be merely affirmative of the pre-existing law. Considering the decision, then, to be directly in point, it is a matter of local law conclusive upon this Court, whatever doubts we might otherwise have been disposed to entertain.*

* The following is the statement of facts in *Partridge and wife* v. *Gordon*.

Joshua Webb was sole seised of the demanded premises, at the times of the several attachments hereafter mentioned by his deed of mortgage, dated September 28th, 1812; being then so seised, conveyed the same to Susanna Webb, the tenor of which deed is as follows, namely

"I, Joshua Webb, &c., in consideration of ten thousand dollars paid by Susanna Webb, &c., hereby give, grant, bargain, sell, and convey unto the said Susanna, her heirs and assigns for ever, the following estate, to wit; the plot of ground, situate in said Falmouth, that Jonathan Webb in his life-time conveyed to the said Joshua, on which the said Joshua's brick house stands, with the said house and other buildings thereon. The following mills, and the privileges whereon they stand, situate in

The circumstance, that there was at the time an existing mortgage upon one moiety, cannot vary the legal result; for Webb was, subject to that mortgage, owner of the entirety; and in point of law, the whole was capable of being set off on execution, as his property, although the creditors must have taken it subject to the mortgage. So is the doctrine in

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said Falmouth on the northeasterly side of Presumscot River, near the bridge over said river passing from Sacarappa to Windham: One saw-mill, and grist-mill within the same frame, standing on the shore of the river; the new single saw-mill, the new double saw-mill, and the old double saw-mill, all in a range, standing on the same falls with the saw and grist mill first mentioned; to have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Susanna, her heirs and assigns, to their use and behoof for ever. And I do covenant with the said Susanna, her heirs and assigns, that I am lawfully seised in fee of the premises, that they are free of all incumbrances, that I have good right to sell and convey the same to the said Susanna, to hold as aforesaid, and that I will warrant and defend the same to the said Susanna, her heirs and assigns for ever, against the lawful claims and demands of all persons. Provided, nevertheless, that whereas the said Susanna and Joshua are administrators to the estate of Jonathan Webb, late of said Falmouth, deceased intestate, and the said Joshua has taken into his own hands most of the personal effects of said intestate; now if the said Joshua shall pay and dispose of said effects, according to law, by paying debts of said intestate, or distributing the same, as the Judge of Probate for said County of Cumberland may decree and order, and do and perform whatever pertains to his trust, as administrator as aforesaid, to keep the said Susanna harmless; then this deed shall be void, otherwise remain in full force." Acknowledged October 3d, 1312; recorded October 5th, 1812.

But neither of the demandants ever entered under said mortgage, although the condition was broken before the commencement of this action.

Prior to the execution of the deed from Joshua Webb to said Susanna, the demanded premises were legally attached at the suit of *Eleazer*

Warren v. *Childs*, (11 Mass. R. 222,) and *White* v. *Bond*, (16 Mass. R. 400.) Nor does it make any difference, that the deed to Webb was not recorded until long after the attachment and levy; for that was material only as to the rights of subsequent purchasers from the grantors; and completely vested the estate in Webb, as against the grantors themselves.

Greeley v. *Joshua Webb and Zacheus Hanniford, Samuel Torrey et al.* v. *Joshua Webb and Zacheus Hanniford, Ezekiel Walker* v. *Joshua Webb, Eleazer Greeley* v. *Joshua Webb*, and *Joseph Morse* v. *Joshua Webb*, all *bonâ fide* creditors of said Joshua Webb; which suits were all entered at the proper Courts, and such proceedings had thereon, that, at the Circuit Court of Common Pleas, holden at said Portland on the third Tuesday of November, A. D. 1812, said Torrey and others recovered judgment against said Webb and Hanniford, for $3246·18 damages, and $21·64 costs; on which judgment execution was issued in due form of law on the second day of December, 1812, and was on the same day delivered to Richard Hunnewell, Esq., Sheriff of said County, who within thirty days after the rendition of said judgment, by order of the creditors, extended the same on said mill and privilege, in manner and form as appears by the appraisers' and Sheriff's return on said execution, which are as follows, namely:

"*Cumberland*, ss. *Falmouth, December 22d*, 1812.

"1st. We, the above named Benjamin Willis, Joseph Cross, Jr., and Nathaniel Partridge, having been sworn as above, have appraised and do hereby appraise and set off seven eighths of the new double saw-mill, on the north side of Presumscot river, and on the lower falls, with all the mill privileges belonging to the same at Sacarappa in Falmouth, as the property of Joshua Webb, of said place, with all the privileges and appurtenances thereto belonging, at the sum of thirty-three hundred and twenty-two dollars. The said premises having been shown to us by Nathan Kinsman, Attorney to the creditors, as the estate of the within named Webb, to satisfy in full the within execution and charges.

BENJAMIN WILLIS, JOSEPH CROSS, JR., NATHANIEL PARTRIDGE.

Falmouth, December 22d, 1812."

So that the levy on the saw-mill, under which the defendants claim title, is wholly void; and it passed by the conveyance of Webb to John Gordon, and by that of the latter to the plaintiff.

Another objection was stated at the bar, that even if the levy of Lewis and Thacher, as executors, on the saw-mill was good, still they had no authority to convey the same, either under the will of their testator, or without a license of Court under the general provisions of law in cases of executions levied on real estate by executors and administrators.

[Next follows the return of the Sheriff, which is omitted in this place.]

The appraisers were all duly appointed and sworn, and the several creditors seasonably received seisin and possession of the lands set off on their respective executions; and all the executions were duly returned into the Clerk's office, and were duly recorded in the Registry of Deeds in said County, within three months after the same were levied.

It is admitted, that said Gordon had, prior to the commencement of this action, purchased by legal conveyances all the right, title, interest, and estate, which the several creditors aforesaid acquired by virtue of the levy of the several executions aforesaid.

And it is agreed, that the Court shall enter up such judgment, as ought by law to be entered on the foregoing facts.

LUTHER FITCH, *for plaintiff.*
S. LONGFELLOW, *for defendant.*

SUFFOLK, ss. SUPREME JUDICIAL COURT. MARCH TERM, 1818.

Nathaniel Partridge and wife v. *John Gordon.*

Continued *Nisi* from Cumberland, June Term, 1817.

Ordered, that the Clerk of this Court, for said County of Cumberland, make the following entry under said action in his docket in that Term, namely: "Upon the facts agreed by the parties, it is considered by the Court, that the said Nathaniel Partridge and wife recover seisin and possession of the double saw-mill and privileges described in the declaration, but not of any other of the premises therein described, and that they also recover their costs."

It is unnecessary to consider this point, because we have already decided the levy to be a nullity. I am authorized to say, that the District Judge concurs in this opinion.

There must, then, be a decree for a redemption of the mortgage, and for taking an account according to the prayer of the bill; and the cause must be referred to a master to take an account, and to make due report thereof to the Court.

Decree accordingly.

George W. Gordon and Administrator
v.
George S. Coolidge and Trustees.

An assignment was made by a debtor for the benefit of his creditors to two Attorneys at Law, who were partners in their business, as trustees; one of them assented to the assignment at the time, the other being absent. It was *held*, that the latter must be presumed to assent also, unless upon notice he refused to accept the trust, and notified it to the debtor; and especially if he and his partner proceeded to act under the assignment by a private conditional agreement between them, as to giving a priority to certain attachments made by them in favor of certain creditors, which agreement was unknown to the debtor. And it *seems*, that even if, under such circumstances, the priority could be held valid, the assignment would be an operative trust, as to all other assenting creditors.

Attorneys at Law, having confided to them by creditors a discretionary power to collect a debt, may in the exercise of their discretion assent to an assignment for the benefit of creditors, and bind their clients thereto, as within the scope of the authority thus confided to them.

Where an assignment is made to two persons, one of whom accepts the trust, and the other repudiates it, the assignment is operative as to the assenting trustee, unless there is some condition in it, that it shall be void, unless assented to by both trustees.

It is not generally true, that persons sued as trustees under the foreign attachment Act of Maine, are to be charged, as such, unless they clearly discharge themselves upon their examination. On the contrary, the Court can adjudge them trustees only, when upon the examination there is clear and determinate evidence, free from reasonable doubt, that they have property in their hands, of which they ought to be adjudged the trustees of the debtor.

Gordon v. Coolidge.

When an assignment is made for the benefit of the creditors, and some of the creditors live at a distance, and signify their assent by letter through the post-office; *Quære*, when is the assent complete? whether at the time, when the letter is put into the post-office, or when it reaches the assignees?

THIS case came before the Court upon a disclosure of the trustees, McGaw and Hatch. The facts upon which it turns are as follows: McGaw and Hatch are Attorneys at Law and partners in business at Bangor. Previous to the month of October, 1831, Loring and Kupfer of Boston sent to McGaw and Hatch a note of the defendant, Coolidge, for $358·56 and interest, for collection. At the same time an account was forwarded to them by Bradley and Sigourney against Coolidge, for $460·30, for collection. McGaw and Hatch on the 4th of October caused writs to be made out on these demands, and delivered them to a Deputy Sheriff to be served whenever necessary. On the 5th of December, 1831, Rufus Dwinal of Bangor came to the office of McGaw and Hatch with a copy of a note of Coolidge owing to Gilman and Pritchard of Boston, for $1271·25, and requested them in behalf of Gilman, Pritchard, & Co., either to obtain security therefor, or its amount in goods. McGaw then told Hatch, that they must instantly secure the demands of Loring and Kupfer, and Bradley and Sigourney, to which Hatch assented. Hatch then went with Dwinal from the office, and called on Coolidge, who declined at first to pay the demand, or to give security; but afterwards, on the same day, he agreed to assign the whole of his stock of goods to McGaw and Hatch, to be disposed of by auction, and the proceeds to be applied in the order named in the assignment, provided Hatch would take the assignment. To this proposal Hatch agreed, with the consent of Dwinal; and an assignment was executed accordingly. McGaw was not present at these transactions. On the 6th of December McGaw was informed

by Hatch of what he had done; and he then told Hatch, that their clients, Loring and Kupfer, and Bradley and Sigourney, must be provided for by attachments, and that they must not rely upon the assignment, unless they should be willing thereafterwards so to do; and then, on notice, the attachments could be dissolved. The Deputy Sheriff made attachments accordingly on the 6th of December. McGaw further stated in his disclosure, that he did not consider the firm of McGaw and Hatch as embracing powers to become assignees, nor did it embrace such powers or objects; but he was willing, that the firm should be assignees of Coolidge, so far as might be done consistently with the existence of the attachments in favor of Loring and Kupfer, and Bradley and Sigourney, but not otherwise; and so he informed Hatch. Pursuant to the arrangements made on the assignment, the stock assigned was sold by an auctioneer, with the exception of the goods attached; and the proceeds (about $3864·80) were paid over to McGaw and Hatch. The suits on the attachments regularly proceeded to judgment and execution; and the Deputy Sheriff, after selling the goods attached, and satisfying the amount due on the executions, returned the surplus ($269·80) to McGaw and Hatch, who thus obtained in the whole about the sum of $4134·60, applicable to the purposes of the assignment.

A copy of the assignment is in the case, bearing date the 5th of December, 1831. After reciting, that Coolidge was indebted to Grant and Stone of Philadelphia, Loring and Kupfer, Bradley and Sigourney, Gilman, Pritchard, & Co., Copeland and Lovering, Gordon and Stoddard, Silas Pierce & Co., &c. &c., it proceeds to assign to McGaw and Hatch all his stock in goods at his store, &c., to be sold by Head and Pilsbury, (auctioneers,) on such terms as McGaw and Hatch shall direct; and the net proceeds of the goods are to

be paid over to the creditors in the following order; and the transfer is made on that express condition; first, to pay Grant and Stone; secondly, to pay Loring and Kupfer; thirdly, to pay Bradley and Sigourney; fourthly, to pay Gilman, Pritchard, & Co.; and fifthly, if sufficient remains, to pay Copeland and Lovering; and the balance of the proceeds to be paid over to the remaining creditors in equal proportions, and if any thing afterwards remains, that is to be for the use of Coolidge. On the same paper under the same date is an acknowlegment of the delivery of the goods to sell and dispose of the same agreeably to the intention of the above transfer; and it is signed by Hatch as follows, "McGaw and Hatch, Attorneys for the creditors herein named." The explanation given by Hatch of this form of signature is, that at the time he considered McGaw and Hatch as Attorneys of Loring and Kupfer, Bradley and Sigourney, and Gilman, Pritchard, & Co., and as Attorneys to as many of the other creditors named in the assignment, as saw fit to become parties thereto, after notice of the same. None of the creditors by name signed or assented to the assignment, except Copeland and Lovering, who did so on the 12th of December, 1831, at 12 o'clock at noon, by a writing on the assignment, and Gilman, Pritchard, & Co., who did so by letter. The letter was dated at Boston on the 12th of December, 1831, and post-marked on that day, (in answer to a letter of McGaw and Hatch, sent on the 8th of the same month,) and was received by the latter in due course of mail, but not until after the attachment of the plaintiffs, which was on the 12th of December, at half past one o'clock at noon. There is no evidence to show at what time the letter was put into the post-office at Boston. McGaw and Hatch considered themselves as authorized to adjust Gilman, Pritchard, & Co.'s demand in any way they thought proper. The letter of the

12th of December says: "Your favor of the 8th is at hand. We accept of the assignment of George E. Coolidge, made in favor of his creditors. Yours, &c." In a subsequent letter of the 25th of December they fully confirm the proceedings of McGaw and Hatch.

The case was argued upon the point, whether the parties were trustees or not, by *Deblois* and *Fessenden* for the plaintiffs, and by *Sprague* and *Longfellow* for the trustees. For the plaintiffs were cited 5 Mass. R. 141; 6 Pick. R. 358; 11 Pick. R. 298; 6 Greenl. R. 381. For the trustees were cited 4 Mason R. 206, 215; 8 Pick. R. 113. The points relied upon at the argument will be found fully stated in the opinion of the Court.

Story J., after stating the facts of the case, said: Such are the material facts apparent upon the disclosures of McGaw and Hatch. If the debts of Copeland and Lovering, and Gilman, Pritchard, & Co., can take effect under the assignment, the balance in the hands of the trustees is about $163·07; and this is subject to the claims for services of the assignees, McGaw and Hatch. If both of these debts are unpreferred, the plaintiffs have an ample security for their own debts; and if either of them is unpreferred, there will be a considerable balance in the hands of the trustees. Under these circumstances two points have been strenuously argued at the bar on behalf of the plaintiffs. The first is, that the assignment itself is utterly void, as to both the creditors. Secondly, that if good as to Copeland and Lovering, still the assent of Gilman, Pritchard, & Co. was not given, until after the attachment was made by the plaintiffs; and so they are cut off from any priority; and their claim must yield to the attachment.

Upon the first point the argument is, that the assignment was made to McGaw and Hatch for the benefit and payment

of all the creditors named therein, in the order of preference stated, and upon that express condition; that McGaw never assented to the assignment absolutely, but only *sub modo*, excepting Loring and Kupfer, and Bradley and Sigourney therefrom; that Coolidge never assented to this modification; and that without McGaw's assent to it the assignment could not take effect, as it was not within the scope of the business of the firm of McGaw and Hatch. And, then the argument proceeds upon the known principle, that a contract, to which both parties have not assented, is binding upon neither; and a modification, not assented to, leaves the original proposition a nullity, if the latter be not accepted.

There is no doubt, that it was not competent for McGaw and Hatch, without the assent of Coolidge, to accept the assignment in part, and reject it in part. If adopted by them at all, it must be deemed to be adopted *in toto*. They could not affirm it as to all the debts, except those of Loring and Kupfer, and Bradley and Sigourney, and disaffirm it as to the latter. And the real question is, whether the transaction has assumed this positive form, or is susceptible of and justifies another interpretation.

In the first place, the assignment was actually executed, and assented to by Hatch on the 5th of December; and delivery was made to him under the assignment on the same day; and accepted by him on behalf of the creditors, for whom the firm, (as he says,) had been authorized to act, that is, for Loring and Kupfer, for Bradley and Sigourney, and for Gilman, Pritchard, & Co. It will, by and by, be considered, whether the firm had any such authority. Now, the assignment, having been accepted by Hatch on behalf of the firm, bound him at all events personally; and bound the firm also, unless, upon notice to McGaw, the latter dissented from the trust, and refused to accept it. It is said, that he

did dissent, because he refused to accept the trust, unless the debts of Loring and Kupfer, and Bradley and Sigourney, were provided for under the attachments. But in point of fact McGaw never notified such dissent to any one, except Hatch. There is not the slightest proof, that he ever communicated the fact to Coolidge. But the firm, with McGaw's express assent and acquiescence, went on to sell the stock, and to act under the assignment; and they have received the proceeds of the sale. Under such circumstances no private reservation of this sort can possibly prevail over the facts of direct co-operation and action in the purposes of the assignment. If the ordering of the attachments was an act inconsistent with the nature and objects of the trust, that was a mere private act, not superseding the assignment, but simply in violation of its provisions; and as such, McGaw and Hatch might be liable for the breach of the trust in an action brought by Coolidge against them. But the creditors of Coolidge have no right or authority to avail themselves of it to overthrow the assignment. The assignment must stand, as valid, until McGaw had done some overt act, known to Coolidge, by which he has repudiated it. But in truth, McGaw's dissent was not to acting as an assignee under the trust; but his objection was to binding Loring and Kupfer, and Bradley and Sigourney, as creditors, to their remedy under the assignment. There is not a syllable in the assignment, which declares it void, unless all the creditors shall assent to it. On the contrary, the irresistible conclusion is, that it was to be held good *pro tanto*, as to all the creditors, who should assent, and void as to those, who should not. Nor is there the slightest proof in the case, that Coolidge made it a condition of the assignment, that Loring and Kupfer, and Bradley and Sigourney, or either of them, should withdraw their intended attachments, or that McGaw and Hatch should assent on their

behalf to the assignment, otherwise it should be void. How can the Court infer such a condition without a *scintilla* of evidence to support it? And yet the basis of the argument of the plaintiffs rests here; for if these creditors were at liberty to adopt or reject the assignment at their pleasure, the act of their Attorneys in rejecting it as to them, left the assignment in full force and vigor as to all other creditors, who should assent to it and take under it. It does not appear to me, therefore, that, upon the evidence, the Court can judicially say, that McGaw ever intended to renounce the character of assignee, whatever may have been his intention, as to binding the creditors, who were his clients, by the assignment.

There are other intrinsic difficulties in this part of the plaintiffs' case. McGaw and Hatch insist, that they had full authority to bind all their clients by the assignment, if in their discretion they chose to exercise it. Nor do I perceive, how, upon the facts, this power can well be denied to them. The debts were confided to them for collection according to their discretion. And if they chose to take security, instead of enforcing an immediate collection by suits, it seems to me clear, that they were at liberty so to do. And they might elect the security of a general assignment, if, in the exercise of a sound discretion, that appeared to them to be the best course for their clients. There is no pretence to say, that any limitation was intended by the creditors upon their discretion. They were left with an implied general liberty to act in the premises, as they might deem best for the interests of their clients. Now, in the present case, they either undertook to bind their clients to the assignment, or they left them at liberty to accept or reject it. If the latter was the predicament, in which the assignment was understood by the parties to leave the creditors, then there is no pretence to say,

that the subsequent attachment was incompatible with, or a breach of, the contract of assignment. If the former was the predicament, then the signature of Hatch, in the name of McGaw and Hatch, being given at the time of the execution of the assignment, bound the creditors, who were their clients; and that consent so given became obligatory, and could not be afterwards retracted. There is no ground to say, that Hatch was not competent to bind the firm for such a purpose. It was clearly within the scope of the agency of partners authorized to collect and secure debts. And, I confess, the strong inclination of my opinion is, that the written acceptance and assent to the assignment by Hatch in the name of McGaw and Hatch, as Attorneys of the creditors, admits of no other interpretation. It was an act binding on the creditors, who were their clients. It has never been repudiated by any of them. And I exceedingly doubt, if, in point of law, it was capable of being repudiated. If, then, the creditors were bound by it, the subsequent acts of McGaw and Hatch in proceeding on the attachments were unjustifiable, and irregular. These acts did not avoid the assignment. They simply gave a right of action to Coolidge, but not to any of his creditors, for redress for any injury he had sustained thereby. He seems not, as far as the evidence goes, to have made any complaint; and it is quite probable, that he has acquiesced in the attachments, as matter either of prior or subsequent arrangement, not injurious to his own interests.

There is yet another view of this point important in itself, and which might, under one aspect of the case, have a great influence upon the decision. The argument is, that, unless McGaw and Hatch both assented to the assignment, and to act as assignees, it was utterly void. But the argument is built on no fact in the case. It stands merely as a presumption from the absence of a contrary provision. Now, I can-

not clearly see my way to adopt the argument. The assignment was made to a firm, as assignees, for the benefit of creditors. Hatch assented to it; and so bound himself, whether McGaw was bound or not. And, as Coolidge has not made it a condition, that both the assignees should accept, my judgment is, that the assignment, in the absence of all countervailing presumptions, vested the property in such assignee as should and did accept the trust. If a grant is made to two persons for their own benefit, I have never understood, that it is void as to both, if not accepted by both. And where the grant is a mere trust for the benefit of third persons, there is still less reason to indulge in such a presumption. It is true, that if the intention of the parties is, that the assignment shall not be operative, unless all the assignees shall accept it, that intention ought to govern the case. But such an intention must clearly appear. It is not to be inferred from equivocal and doubtful circumstances, admitting of different interpretations. I see nothing in this case, which will enable the Court to say, that Coolidge did not intend, that the assignment should take effect, unless McGaw, as well as Hatch, consented to act as assignee. In every view of the matter, my judgment is, that the assignment was not a void instrument; but that it took effect from the time of its delivery, as to all creditors, who assented to it before the attachment of the present plaintiff was made.

The other question is one of more nicety and difficulty. It is said, that where parties, summoned as trustees, fail to discharge themselves by any ambiguity in their disclosures, they are to be adjudged trustees. That proposition requires many qualifications, and may be true or not, according to circumstances. If upon the disclosure it is clear, that there are goods, effects, and credits of the debtor in the hands of a trustee; but it is left uncertain by the disclosure, whether the

goods, effects, or credits are affected by interests, liens, or claims of third persons or not, and the trustee has knowledge of all the facts and withholds them, or evades a full examination; that may furnish a good ground to presume every thing against him, so far as there are ambiguities. But if he fully and clearly discloses all he knows; and upon the whole evidence it is left in reasonable doubt, whether, under all the circumstances, he be trustee or not; in such a case, I apprehend, he is entitled to be discharged. A different doctrine would be most perilous to the supposed trustee; because he possesses no power to compel disclosures from third persons relative to the property; and no extraneous or collateral evidence of third persons is admissible in the suit, to establish or discharge his liability. It is to be decided solely and exclusively by his answers. He might, upon any other doctrine, be innocently compelled to pay over the same property twice to different persons, holding adverse rights, because he might be without any adequate means of self-protection. The law, therefore, will not adjudge him a trustee, except upon clear and determinate evidence drawn from his own answers. I am aware, that there are cases, which seem to inculcate a more rigid and severe doctrine; such as *Sebor* v. *Armstrong*, (4 Mass. R. 206,) and *Cleveland* v. *Clapp*, (5 Mass. R. 201.)[1] But they are perhaps explicable upon other grounds; and at all events, they do not, to my judgment, present such a direct authority as ought to overcome the doctrine already stated.

There are two points of view, under which the facts, in regard to the assent of Gilman, Pritchard, & Co., are presented by the argument. The first is, that there was an original assent at the time of the execution of the assignment by

[1] *United States* v. *Langton and Trustees*, 5 Mason R. 282.

their agent, Dwinal, and by Hatch, as their Attorney. The second is, that the assent of Gilman, Pritchard, & Co. is to be deemed complete and perfect from the moment the letter was put into the post-office at Boston: and as the letter was put into the post-office on the same day, that the attachment was made; and as the trustees have no means of ascertaining and stating with certainty, whether it was on that day before or after the time of the attachment; and as evidence *aliunde* is not admissible to establish it; the Court ought not to adjudge the parties trustees, as they may thus be rendered twice responsible, if it shall hereafter be established, that the letter was in fact put into the post-office before the attachment.

This latter point involves questions of a good deal of nicety, upon which the authorities are not entirely agreed, and upon which much juridical astuteness of argument and opinion has been employed. Whether, then, the assent is to take effect from the moment, when the letter is placed in the post-office; or from the time when the notice reaches the trustees, if the assent is not in the intermediate time withdrawn; whether, if not withdrawn, it relates back after notice to the period, when first placed in the post-office; and whether, if the assent is once given, it can be withdrawn at any time before the letter reaches the trustees, by any intermediate though uncommunicated act;—these are questions admitting of no small scope of argument and observation. *Merlin*, in his Répertoire, (title *Vente*, § 1, art. 3, note xi. Vol. 36, pp. 42, 50–54,) to which I have been referred by my brother, the District Judge, has given an elaborate pleading or argument on the subject, in which he has cited many of the continental authorities. It will well reward a diligent perusal. Then, there are the cases of *Adams* v. *Lindsall*, (1 Barn. & Ald. R. 681,) and *McCulloch* v. *The Eagle Insurance Company*, (1 Pick. R. 278,) pressing on the same points. I am studi-

ous of avoiding any decision on these controverted matters, unless they are absolutely indispensable upon the present occasion. And it does appear to me, that we may dispose of the present case upon the first point already stated; that is, that Dwinal and Hatch had an original authority to assent to the assignment in virtue of the general implied power from Gilman, Pritchard, & Co. to Dwinal, "to obtain security for the note due to them, or its amount in goods." It is said, that there is no proof, that Dwinal had any such authority. But it appears to me, that under the circumstances the fair presumption is, that he had the authority. He acted as upon authority, and gave directions to the Attorneys, and assented to the assignment; and the Attorneys understood him to have full power, and governed themselves accordingly. There is no pretence to say, that Gilman, Pritchard, & Co. have ever repudiated his acts, or denied his powers, or treated him as a tortious interloper in their affairs. That he was an agent to collect their debt, or to secure it, does not seem susceptible of any doubt; and if an agent, we cannot presume a limitation upon his agency inconsistent with his acts. There must be proof to establish that he has exceeded it. The letter of Gilman, Pritchard, & Co. of the 12th of December, in reply to the statement of the proceedings in regard to the assignment, contains no expressions controlling the presumption of authority. They simply express their acceptance of the assignment, without a single intimation, that Dwinal, or McGaw and Hatch, had acted against their instructions. And in a subsequent letter (of the 23d of December), written, indeed, after the attachment of the plaintiffs was known to them, but still evidence in the case, they say to McGaw and Hatch: "We consider, that we agreed to the assignment the moment it was made through yourselves, our agents." Now, the Court are called upon to draw the conclusion from the mere

deficiency of positive proof of an antecedent authority, that there was in fact none; and this conclusion is to be drawn against the direct statement of Hatch, that he supposed the firm of McGaw and Hatch fully authorized through Dwinal; and without any corroborative circumstances to fortify it. I cannot persuade myself, that, in a process of this nature, the Court are to indulge in any such latitude of inference and conjecture. We ought to see clearly, that there was no such antecedent authority, in order to defeat the title under the assignment. If the disclosures leave the weight of presumption the other way, the Court are bound to abstain from declaring the parties trustees in the suit, as to the sum retained for this particular debt. And this, upon the most mature reflection, is the judgment to which my mind has arrived.

The remaining consideration is, what deductions are to be allowed to the trustees from the small balance in their hands, for which they are liable to be adjudged trustees. That will require further interrogatories to be put to them on this point; and for this purpose, and for this only, should I be disposed to allow any further interrogatories.

The District Judge concurs in this opinion, and the cause will be disposed of accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1834, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

THE SCHOONER VOLUNTEER AND CARGO, THEOPHILUS PARSONS AND OTHERS CLAIMANTS.

The Admiralty has jurisdiction in cases of charter-parties for foreign voyages; and may enforce, by a proceeding *in rem*, the maritime lien for freight under a charter-party.

The general owner is owner for the voyage, notwithstanding a charter-party, if the vessel is navigated at his expense, and by his master and crew, and he retains the possession and management of her during the voyage; and especially, where he retains a part of the vessel for his own use.

By the general Maritime Law, there is a lien on the goods for freight, whether shipped under a bill of lading, or a charter-party. But that lien may be waived or displaced by any special agreement inconsistent with such lien. But it is presumed to exist, until such inconsistency appears.

A stipulation for the payment of the freight *ten* days after the *return of the vessel*, is not necessarily inconsistent with such lien.

By the Maritime Law, the ship is pledged to the merchandise, and the merchandise to the ship, for the performance of the contract of shipping.

A clause in the charter-party, that the parties bind the ship and goods respectively for the performance of the covenants, payments, and agreements thereof, is a valid clause, creating a pledge or lien on the goods for such performance; and may be enforced against the goods by a detention by the ship-owner for the freight; and by a suit in the Admiralty.

LIBEL *in rem* for freight, brought by Ezra Weston, libellant, against the proceeds of the cargo of the schooner Volunteer,

for freight asserted to be due to the libellant, as owner of the vessel, and earned under a charter-party made by the libellant with Messrs. Bixby, Valentine, & Co. on a voyage from Boston, (Massachusetts,) to Havana in the Island of Cuba, and back again to Boston. In the course of the voyage Messrs. Bixby, Valentine, & Co. failed in business, and the proceeds of the outward cargo, then on board, were assigned to the claimants as assignees for the creditors; and though the voyage was successfully performed, they decline the payment of the freight upon the grounds stated in their answer. The libellant, upon the arrival of the schooner at Boston, refused to deliver up the homeward freight without payment or security for payment of the freight. The parties then agreed to have the same sold, and the proceeds deposited as a substitute, subject to the same claims for freight and process as the cargo might be. The present libel was accordingly filed against the proceeds. The assignees filed a claim and answer denying the jurisdiction of the Court, and the rights of the libellant to any lien for the freight; and praying a restitution of the same to them.

The cause was argued by *C. P. Curtis* for the libellant, and by *Theophilus Parsons* for the claimants. But the points made by the Counsel are so fully stated in the opinion of the Court, that it is not deemed necessary to state the arguments at large.

Story J. This is the case of a libel *in rem* for freight earned under a charter-party, brought by the general owner of the schooner Volunteer against the homeward cargo, (the proceeds being substituted for it by consent of parties,) which the claimants assert a title to under an assignment of the charterers, who became insolvent in the course of the voyage.

Three questions have been made at the bar. First, whether

the District Court possesses jurisdiction, as a Court of Admiralty and maritime jurisdiction, over the cause. Secondly, who, upon the true interpretation of the terms of the charter-party, was the owner for the voyage. Thirdly, whether, upon the terms of the instrument, there is any lien on the homeward cargo for freight, supposing the ownership for the voyage to be in the libellant.

It is now approaching nearly to twenty years, since I had occasion to consider with laborious care and attention the nature and extent of the jurisdiction of the Admiralty over maritime contracts.[1] The conclusion, to which my mind then arrived, was, that the Admiralty had an original, ancient, and rightful jurisdiction over all maritime contracts, strictly so called, (that is, such contracts as respect business, trade, and navigation to, on, and over the high seas,) which it might exert by a proceeding *in rem* in all cases, where the Maritime Law established a lien or other right *in rem*, and by a proceeding *in personam*, where no such lien or other right *in rem* existed. The Courts of Common Law, it is true, had on various occasions denied, opposed, and sought to restrict this jurisdiction. But their decisions have been founded in no uniform principles or reasoning; and have been, if it may be so said without irreverence, more the offspring of narrow prejudice, illiberal jealousy, and imperfect knowledge of the subject, than of any clear and well-considered principles. These decisions have fluctuated in opposite directions at different periods; and the final results, unfavorable to the Admiralty, have been in a great measure owing to a deference for the learning of Lord *Coke*, whose hostility to the Admiralty, not to speak of his disingenuousness, entitle him to very little respect

[1] *De Lovio* v. *Boit*, 2 Gall. R. 398.

in such a discussion.[1] At all events, the contradictory nature of these decisions, and the state of the law on the subject at the time of the emigration of our ancestors, as well as the structure and jurisdiction of the Vice-Admiralty Courts under their commissions, on that occasion seemed to me to require, that the jurisdiction of the Admiralty in America should be re-examined, and established upon its true principles, and maintained upon its just original foundations. If, since that period, I had found reason in any subsequent researches to change these opinions, I should not hesitate on the present occasion to avow and correct errors; for the advancement of juridical truth is, and ever ought to be, far more important to every Judge, than any narrow adhesion to his own preconceived and ill-founded judgments. But I am free to confess, that after every thing, which I have heard and seen in the intermediate period, whether in the shape of appeals to popular prejudices, or of learned and liberal arguments, or of severe and confident criticism, I have been unable to change these opinions. They remain with me unshaken and unrefuted. Whether it is fit, that the Admiralty jurisdiction of the United States should be administered upon its just and original principles; or whether it should be bound down and crippled by the arbitrary limitations of the common lawyers; it is not for me to decide. I have no desire to extend its just boundaries, or, by any attempt to amplify its justice, to encourage usurpation. But, believing as I do, that it is a rightful jurisdiction, highly promotive of the best interests of com-

[1] The learned reader will find this subject much discussed in Prynne's very able Expositions of Lord *Coke's* errors, in his Animadversions on the 4th Institute, ch. 22, on the Admiralty Court. Prynne's Animad. pp. 75 - 133. See also Buller J. in *Smart* v. *Wolff*, 3 T. R. 348. 2 Bro. Adm. Law, pp. 83 - 85, 460.

merce and navigation, and founded in the same enlightened wisdom, which has sustained the Equity jurisdiction through all its earlier as well as later perils, I cannot consent to be the instrument of surrendering its powers, consistently with my own conscientious discharge of duty. Other persons with different opinions may concur in reducing it to a state of decrepitude, which will leave it neither dignity nor power; and I shall not scruple to obey their decisions, when they shall have judicially prescribed the limits, which I am bound not to transcend.

But, although I am prepared to vindicate the Admiralty jurisdiction over all maritime contracts, as matter *juris et de jure*, it is not my intention to do more than to affirm it in the present case, where the suit is founded upon a claim of freight under a charter-party for a voyage on the high seas. And, in the first place, I shall show what has been the claim of the Admiralty itself in relation to this matter; and in the next place, how it stands or has stood upon the authority of adjudications at the common law.

In regard to the jurisdiction asserted by the Admiralty over charter-parties, it can be traced back to the very earliest records of the Court. We find from the records contained in the Black Book of the Admiralty, (a work of high antiquity and undoubted authority,) that as early as the second year of the reign of Edward the First, that Monarch with the assent of his Lords, (*ses Seigneurs,*) by an Ordinance made at Hastings, expressly prohibited all seneschals and bailiffs of the Lords of Franchises on the sea-coasts from taking cognizance of any pleas touching merchant or mariner, as well by deed as by *charter of ships*, obligations, and other deeds beyond twenty shillings or forty shillings in amount, upon penalty of prosecution therefor in the Admiralty. And it was declared by the same Ordinance, that every contract

made between merchant and merchant, or merchant and mariner, beyond seas or within the flood-mark, should be tried before the Admiral, and not elsewhere.[1] This Ordinance was fully recognised and enforced by penal sanctions in the reign of Edward the Third.[2] The early commissions to the Admiralty were conceived in terms so general and broad, as to include an ample jurisdiction in all maritime contracts.[3] After the passage of the Statutes of 13th Richard II., ch. 5, and 15th Richard II., ch. 3, whose prohibitions can by no just construction be applied to charter-parties made in foreign ports for foreign voyages, even if they can be applied (which I do not admit) to charter-parties made within the realm, for voyages on and over the high seas, or beyond seas, the commissions of the Admiralty contained a proviso, that the Admiralty should not take cognizance of any contracts, pleas, or complaints *(quereles)*, made or arising on land or water, *within the body of any county*.[4] Mr. *Prynne* (a most learned antiquarian) does not hesitate to affirm, that, from the time of passing these Statutes down to the time, when Lord *Coke*, in the beginning of the reign of King James the First, commenced his hostilities against the Admiralty jurisdiction, there is

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1 Clerke's Praxis. Roughton, art. xxxviii. pp. 143, 144, C. 20, 21. Id. art. xvii. p. 120. Id. art. xxvi. p. 130. Prynne's Animad. pp. 111, 114–116. Id. pp. 83, 88, 90, 103, 123. 2 Gall. R. 402, 404.

2 Ibid.

3 See Prynne's Animad. pp. 85, 118–122. 2 Gall. R. 405, 406.

4 Prynne's Animad. pp. 85, 118–122. Mr. *Prynne* has with great learning and ability endeavoured to show from the petitions to Parliament, on which the Statutes of Richard the Second were grounded, that they were not intended to abridge the original jurisdiction of the Admiralty; but to take away encroachments of the Admiralty in regard to persons and things, which had nothing to do with maritime contracts or transactions on or beyond the seas. Prynne's Animad. pp. 77–85.

not to be found a single case, with the exception of *Tooley's case*, (36 Hen. 8,) (which can in no correct view be deemed a decision on the point,[1]) in which, upon maritime contracts made in foreign ports, any prohibition had ever been granted.[2] And yet during all this period, he insists, that suits upon foreign charter-parties, and other foreign maritime contracts, were constantly brought and decided in the Admiralty.[3] The Admiralty did not, indeed, limit itself to foreign maritime contracts; but insisted upon maintaining jurisdiction over charter-parties for foreign voyages, and other maritime contracts, made within the realm, upon the ground, that the Statutes of Richard never intended to touch or trench upon this ancient and well-founded jurisdiction. Sir *Leoline Jenkins* has expounded this subject with great clearness and force in his celebrated argument before the House of Lords, in favor of the Admiralty jurisdiction; and he applied it especially to charter-parties made within the realm, for voyages over or beyond the seas.[4] He is supported in this opinion by *Zouch*, *Godolphin*, and *Exton*; and by the constant claim and exercise of the jurisdiction by the Judges of the Court of Admiralty down to his own times.[5] The language of the commissions, granted to the Admiralty after these Statutes were passed, proceeded upon the grounds, that it was a rightful jurisdiction. *Zouch* has given us a transcript of the common form of these commissions, which he asserts to have been of one uniform tenor

[1] Prynne's Animad. pp. 76, 83.

[2] Id. pp. 76, 77, 83, 84.

[3] Id. pp. 83, 84. 2 Gall. R. 443, 444.

[4] 1 Sir Leo. Jenkins's Works, by Wynne, p. 6. Hall's Law Journal, p. 557.

[5] See Zouch's Adm. Jurisd. pp. 98, &c., 102, 118. Godolphin's Adm. Juris. pp. 42, 44, 129, 132, 141. Exton's Dicæology, Pt. 3, ch. 2, 3, 4, 5, 6, 7, 8. See also Id. pp. 321, 386.

from the time of Queen Mary down to the time of Charles the Second. The language of these commissions gives authority "to hold conusance of pleas, &c., *charter-parties*, contractions, bills of lading, and all other contracts, which may any ways concern moneys due for freight of ships hired, or let to hire."[1] The Statute of 32d Henry VIII., ch. 14, also, which, for the purpose, as it avows, of aiding the navigation and commerce of the realm, makes many special provisions in regard to charter-parties for voyages from London to foreign countries, and from the latter to London, expressly gave to the Court of Admiralty jurisdiction to entertain suits for negligent keeping of the merchandise shipped, and delays in the voyage, against the owner and master of the ship.[2] And yet Lord *Coke*, with singular disingenuousness, has wholly suppressed this clause in his statement of the Statute; and has given to its provisions a false coloring, which cannot fail to mislead the reader.[3]

In the next place, as to the doctrine of the Courts of Common Law. It is true, that the jurisdiction asserted by the Court of Admiralty over charter-parties and maritime contracts, was not, after the Statutes of Richard II., admitted by the Courts of Common Law to be well founded. But it is equally true, that it was not uniformly denied by those Courts. On the contrary, there are to be found various cases, where the jurisdiction has been directly or indirectly affirmed.[4]

[1] Zouch's Adm. Jurisd. p. 92. 2 Gall. R. 452, note.

[2] The Statute is given at large in the recent edition of the Statutes, published by authority of the British Parliament. *Prynne*, in his Animadversions, pp. 121, 122, has given the proviso verbatim; and I have myself examined the Statute in order to ascertain its correctness. See also Zouch's Adm. Jurisd. p. 106.

[3] 4 Inst. p. 139.

[4] See *De Lovio* v. *Boit*, 2 Gall. R. 447–452. Exton's Dicæol. Pt. 3, ch. 7, p. 338, &c. Id. ch. 8, p. 352, &c. Id. ch. 9, p. 360.

The struggle, indeed, by the Admiralty to maintain its ancient jurisdiction was constantly renewed, as often as the Courts of Common Law sought to restrain it. This struggle was, about the middle of the reign of Queen Elizabeth, (in May, 1575,) brought to an issue by a complaint of the Court of Admiralty to the Queen; and thereupon the Judges of the King's Bench, and the Judge of the Court of Admiralty, came to an agreement on the subject, which is given at large by *Prynne*, and *Zouch*, and Lord *Coke*.[1] One of the articles of agreement is as follows: "It is agreed, that the said Judge [of the Admiralty] may have and enjoy knowledge and breach of charter-parties made between masters of ships and merchants, for voyages to be made to the ports beyond the seas, and to be performed beyond and upon the seas, according *as it hath been accustomed, time out of mind*, and according to the good meaning of the Statute of 32d Henry VIII., ch. 14, *though the same charter-parties happen to be made within the realm.*" This agreement remained in full force and operation until Lord *Coke* became Chief Justice of the Court of Common Pleas, in the sixth year of the reign of James the First, when he granted a prohibition in a case of this sort. The subject was then brought before the King; and we have now the answer of Lord *Coke* and his brethren given in answer to the articles of agreement on that occasion, in his 4th Institute, (p. 134.) And what is the answer of Lord *Coke* to the agreement? He does not attempt to deny the genuineness or authority of the document in direct terms. But he uses the following language: "That for so much thereof as differeth from these answers, it is against the laws and Statutes of this realm; and *therefore* the Judges of the

[1] 4 Inst. p. 134. Zouch's Adm. Jurisd. p. 14. Prynne's Animad. p. 96. 3 Wheaton R. 365, 367 note.

King's Bench never assented thereto, as is pretended; neither doth the phrase thereof agree with the terms of the laws of the realm." It is incredible, that this supposed agreement should have been spurious. It was recorded (or *reserved*, as *Prynne* says) in the Court of Admiralty, and produced before the King by the then Judge of the Admiralty, as a genuine paper, containing the points of jurisdiction insisted on by the Admiralty on one side, and the separate answers to each by the Judges of the King's Bench, on the other side.

The controversy was from that time renewed with unabated vigor on each side, and continued until the reign of Charles the First, when the subject was again brought before the King in Council, upon the complaint of the Admiralty; and the matters in difference between the Admiralty and the Courts of Common Law were several times heard and debated at large. At length, in February, 1632, certain articles were drawn up, read, agreed to, and resolved upon, by the King and Council, and signed and assented to by the twelve Judges of England, and the then Attorney-General, and entered upon the Registry of the Council.[1] To these articles of agreement Lord *Coke's* objection cannot apply, that they were never signed or assented to by the Judges. The first of these articles is in these words: "If a suit should be commenced in the Admiralty upon contracts made, or other things personal done, beyond the seas, or upon the sea, no prohibition is to be awarded." The second is: "If suit be before the Admiral for freight, or mariners' wages, or for breach of charter-parties, *for voyages to be made beyond the seas*, though the charter-party happens to be made within the realm, so as the penalty

[1] Prynne's Animad. pp. 100, 101. Godolphin's Adm. Jurisd. p. 157. Exton's Dicæol. p. 403. Zouch's Adm. Jurisd. pp. 122, 123. 2 Browne's Adm. Law, p. 78. Hall's Adm. Practice, Intro. Jurisd. xxiv. D.

be not demanded, a prohibition is not to be granted. But if the suit be for the penalty; or if the question be, whether the charter-party were made or not; or whether the plaintiff did release, or otherwise discharge the same *within the realm;* this is to be tried in the King's Court at Westminster, and not in his Court of Admiralty." The restrictions here insisted on, are of matters exclusively arising on land within the realm, and in no wise of facts arising on the sea, or beyond seas.

It is difficult to conceive, how any case of jurisdiction could be more firmly and deliberately settled, than on such an occasion. The very circumstance, that it contained the opinions, and had the judicial assent of the Judges of the realm, as well as of the King and his Council, (an uncommon number being assembled for the purpose,) gives to it as great a sanction of authority in point of law, as any, which can be imagined. If the opinions of Lord *Coke* and his brethren at a former period are to be held of any authority, as evidence of the law; how much more weight ought to be attributed to such a solemn re-examination of the whole subject under such circumstances? I profess myself wholly unable to comprehend any grounds, upon which the conclusiveness of such an adjudication can be gainsaid or overturned. Sir *Leoline Jenkins* has remarked, that this act of Council was the result of many solemn debates; and not the effect of artifice and surprise; that it was enrolled in the several Courts of Westminster, as the resolutions of all the Judges, and as a standing rule to be observed for the future; and that it was punctually observed, as to the granting and denying of prohibitions, until the late disorderly times, (the times of the Commonwealth,) bore it down, as an act of prerogative, prejudicial (as was pretended) to the common laws, and the liberty of the subject. And he then adds, that it was not long before

the usurping powers found it necessary, for the encouragement of trade and navigation, to make several Ordinances confirming the jurisdiction.[1]

The learned Judge is well warranted in these statements. There is a case of a libel for freight reported by *Prynne*, in which he was Counsel, and which was finally decided by the House of Lords upon appeal in 1645, in which the jurisdiction of the Admiralty to maintain such a suit, was expressly affirmed, and a procedendo was awarded to the Court of Delegates, (in which the suit was then pending,) to proceed and decide the cause; and they accordingly did decide it in favor of the libellant, and he had execution for his debt and costs accordingly.[2] Here, then, we have the highest judicial authority of the realm asserting the same jurisdiction, which had been asserted by the twelve Judges in 1632. In *Scobell's* Collection of Ordinances during the Commonwealth, we also find the Act or Ordinance, passed by Parliament during the time of the Commonwealth, on the subject of the jurisdiction of the Admiralty. It was first passed in 1648, and was by subsequent Ordinances made perpetual. But, though it was carried into full effect during the Protectorate; yet upon the restoration of Charles the Second it was treated, like all the other Ordinances of Parliament during the Commonwealth, as an act of usurpation, and therefore it then in a legislative sense expired. The Ordinance expressly declares, among other things, that the Court of Admiralty shall have cognizance and jurisdiction "in all cases of charter-parties, or contracts of freight, bills of lading," &c.[3]

[1] 1 Sir Leoline Jenkins's Works, Argument on Adm. Jurisc. 6 Hall's Law Journal, p. 568.

[2] Prynne's Animad. pp. 123, 124. Mr. *Prynne* has given a copy of the judgment of the House of Lords.

[3] See Hall's Adm. Practice, Jurisd. xxiv. E.

It is most material to observe, that this affirmation of the Admiralty jurisdiction over charter-parties in 1632 was about the period of the emigration of our ancestors; and the jurisdiction continued to be so held until 1660. So that it may be deemed to have been brought by them to this country, as a part of the then acknowleged common law of the land. But it is still more material to state, that the prohibitions of the Statutes of Richard the Second, whatever may be their true interpretation, are by their very language and objects limited to the High Court of Admiralty, and its proceedings within the realm of England; and they do not affect to control the ancient jurisdiction exercisable by the Lord High Admiral elsewhere out of the realm; and never were applicable in terms to the Vice-Admiralty Courts in the Colonies. At least, I have never been able to find any decisive traces of such limitations, acknowledged or acted upon in the Vice-Admiralty Courts. On the contrary, in all the forms of the commissions of the Vice-Admiralty Courts, which have fallen under my observation, there is a most ample enumeration of jurisdiction in all maritime causes. *Stokes*, in his History of Colonies (p. 166), has given a copy of the common form of the commissions of the Vice-Admiralty Courts; and it is precisely in the same terms with all the others, which I have seen. It grants authority "to take cognizance of, and proceed in, all civil and maritime causes, and in complaints, contracts, offences, &c., pleas, debts, &c., *charter-parties*, agreements, suits, trespasses, injuries, &c., and business civil and maritime," &c.[1] So that, unless we are prepared to say, that these commissions

[1] A similar commission, with similar terms of jurisdiction was granted to Govenor Wentworth of the Royal Province of New Hampshire, in 6th George III. There will be found a citation from it of a corresponding passage in 2 Gall. R. 470, note.

issued by the Crown from time to time to the Vice-Admiralty Courts in the American Royal Provinces, as well as in the Colonies generally, are to be treated as clear usurpations of authority, (which would be a bold proposition to maintain,) there seems every reason to hold, that the Admiralty jurisdiction in the colonies and provinces was not affected by the Statutes of Richard. Dr. *Browne* informs us, that as late as 1764, a suit for freight was maintained in the Vice-Admiralty Court of Gibraltar; and that down to his own day, (in 1800,) suits on charter-parties and by material-men were often brought in Ireland without any prohibition.[1] In a very recent case, (*The Elizabeth*, 1 Hagg. Adm. R. 226,) which was a libel on a charter-party, originally brought in the Vice-Admiralty Court at the Cape of Good Hope, an appearance was given to the suit under protest to the jurisdiction. The commission contained authority, (as in common patents,) to take cognizance of charter-parties; and the protest was overruled, and a decree to pay the money into Court was made; and it was paid into Court accordingly; and an appeal was taken to the High Court of Admiralty. The appeal not being prosecuted, the appellate Court pronounced the appeal to be deserted, and condemned the appellant in costs. This decree cannot he vindicated except upon the supposition, that the Vice-Admiralty Court was, in the opinion of Lord *Stowell*, competent in point of jurisdiction to entertain the suit. It may be very different with the High Court of Admiralty in England. Under the torrent of prohibitions,[2] which have been poured upon it in former times, it is indeed difficult to know, what construction ought to be put upon any of the terms of the Admiralty commission. Lord *Stowell* is

[1] 2 Browne's Adm. Law, p. 122, note, (74.) Id. pp. 534, 535, 538.
[2] Id. p. 85.

but too well justified in the remark made by him, in the spirit of uncomplaining, but conscious injustice, that "it is universally known, that a great part of the powers given by the terms of that commission are totally inoperative; and that its actual jurisdiction stands in need of the support of continual exertions and usage."[1] And Dr. *Browne* is so little satisfied with the decisions made on the subject of the Admiralty jurisdiction by the Courts of Common Law during the reign of Charles the Second, that he does not scruple to say, "that if a party were to institute a suit in the High Court of Admiralty on a charter-party for freight, I do not see, how the Court could refuse to entertain it; and I have some reason to think, that this my opinion is supported by very high authority."[2] Who the high authority is, to whom he here alludes, we have no means of knowing, though it might perhaps be conjectured, that he alludes to Lord *Stowell*, then presiding in the High Court of Admiralty. However this may be, I for one cannot yield up my own judgment upon this subject, supported as it is by the clearest evidence of an ancient and well-settled original jurisdiction in the Admiralty, by the assent and agreement of the twelve Judges in 1632, and by the deliberate judgment of the House of Lords in 1645, to later adjudications by any inferior tribunals, having nothing to commend them in the depth of the learning or reasoning, which they display, and built upon no consistency of principles. Having gone over this matter at large in *De Lovio* v. *Boit*, (2 Gall. R. 437–467,) I do not propose to re-urge the arguments there urged; and I content myself in conclusion by stating my deliberate judgment to be in favor of entertaining jurisdiction in the present case. Mr. Chancellor *Kent* has

[1] *The Apollo*, 1 Hagg. Adm. R. 312, 313.

[2] 2 Browne's Adm. Law, p. 122.

also expressed his decided opinion in favor of the jurisdiction;[1] and my learned brother, Judge *Ware*, has supported it by great force of reasoning and depth of learning, in the case of *Drinkwater* v. *The Cargo of the Brig Spartan*, (3 American Jurist, p. 26.)

The next question is, who is to be deemed owner for the voyage under the terms of this charter-party. The instrument begins in the common form; and after naming the parties, it proceeds to state, that it is witnessed, "that the said Weston, [the libellant,] for the consideration thereinafter mentioned, has letten to freight the whole of the said schooner with appurtenances to her belonging, except the cabin, which is reserved for the use of the master, and what room is necessary under deck for provisions, wood, water, and cables, for a voyage from this port [Boston] to Havana in Cuba, and thence back to this city [Boston], where she is to be discharged, dangers of the seas excepted." It then proceeds to state, that the libellant covenants, that the schooner shall be tight, staunch, and strong, and be sufficiently tackled and apparelled for such a voyage; and that it shall be lawful for the charterers, as well at Havana as at Boston, to load and put on board, both under and on deck, a loading of such goods, as they shall think proper, contraband goods excepted; and the libellant is to pay all and every charge of victualling and manning the schooner during the voyage, and is to furnish the schooner victualled and manned; and the other charges, port charges, pilotage, &c., are to be borne by the charterers; and they are to make advances, not exceeding $100, to the master during the voyage. In consideration whereof the charterers agree to pay to the libellant, in full for freight or hire, at the rate of $400 for each and

[1] 3 Kent's Comm., Lect. 47, p. 220, (2d edition, 1832.)

every calendar month, and so in proportion for a less time, as the schooner shall be employed in the voyage, from the 1st of December, 1833, "*within ten days after her return to Boston*, or in case of loss, to the time she was last heard of." And in conclusion it states, "To the faithful performance of all and singular the covenants, payments, and agreements the parties aforesaid, each to the other, do hereby bind themselves, their heirs, executors, and assigns, *especially the said Weston, the said schooner, and the said Bixby, Valentine, & Co., the goods to be laden on board the said schooner*, in the penal sum of $ 2,000 firmly by the said presents."

Such is the substance of the charter-party. And upon the construction of the terms of it, I cannot entertain a doubt, that Weston, (the libellant,) remained the owner for the voyage. The vessel was equipped, and manned, and victualled by him; and at his expense during the voyage; and he covenanted to take on board such goods in the voyage, as the charterers should think proper. The whole arrangements on his part in these respects sound merely in covenant. It is true, that in another part of the instrument it is said, that he has letten to freight, (which may seem to import a present *demise* or *grant*, and not a mere covenant,) the whole schooner for the voyage. But this language is qualified by what succeeds. And the whole schooner is not let; for there is an express exception of the cabin and certain portions of other room under deck. If the whole schooner, then, was not granted during the voyage on freight, how is it possible to contend, that the libellant did not still remain owner for the voyage? The master was his master, appointed by him, and responsible to him; the crew were hired and paid by him; and the victualling and manning were at his expense. He also retained the exclusive possession of a part of the vessel

for the voyage, and the control and navigation of her during the voyage. Taking, then, the whole instrument together, it seems wholly inconsistent with the manifest intent of the parties, that the charterer should be the owner for the voyage. It appears to me, that this case is governed in all its circumstances by decisions, which have been made by the Supreme Court of the United States. In *Hoe* v. *Groverman*, 215 (1 Cranch R. ~~24~~,) under circumstances far less cogent and expressive, the Supreme Court held the general owner to be owner for the voyage, although in that case the *whole tonnage* of the vessel was let for the voyage. The case of *Mascardier* v. *The Chesapeake Insurance Company*, (8 Cranch R. 39,) is almost identical with the present in its leading circumstances. And the Court there laid down the broad distinction in the following terms: "A person may be owner for the voyage, who by contract with the general owner hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership." Tried by this test, there cannot be a doubt, that the libellant remained the owner for the voyage.[1] I am aware, that there are in the English cases some very nice distinctions, and perhaps some decisions not very easily reconcilable with each other. But it appears to me, that the current of authority in the Courts of Westminster Hall ranges itself on the same side with the decisions of the Supreme Court, and with the decisions of the American State Courts on the same subject. I do not go

[1] See also *Gracie* v. *Palmer*, 8 Wheaton R. 605, and *Colvin* v. *Newberry*, 1 Clarke & Finelly's R. 283.

over the cases. Many of them will be found collected in Abbott on Shipping, and in the notes to the American edition of 1829, (pp. 19–22, 173–178); in Holt's Law of Shipping, (Pt. 2, § 15, pp. 195, 196); and in the learned Commentaries of Mr. Chancellor *Kent*, (3 Kent's Comm. Lect. 45, 2d edition, p. 137, &c.)[1] Some stress was laid, in the argument at the bar, on the fact, that the master received his letter of instruction from the charterers; and that the libellant gave him a copy of the charter-party only, and verbal orders to proceed accordingly. But I cannot perceive, how these circumstances vary, in the slightest manner, the legal predicament of the case. They are perfectly consistent with the libellant's remaining owner for the voyage.

The third and far the most difficult question is, whether there was a lien on the homeward cargo for the freight. In general, it is well known, that by the common law there is a lien on the goods shipped for the freight due thereon, whether it arise under a common bill of lading or under a charter-party. But, then, this lien may be waived by consent; and in cases of charter-parties, it often becomes a question, whether the stipulations are, or are not, inconsistent with the existence of the lien. For instance, if the delivery of the goods is by the charter-party to precede the payment or security of payment of freight; such a stipulation furnishes a clear dispensation with the lien for freight; for it is repugnant to it, and incompatible with it. On the other hand, where such payment, or security of payment of freight, is to be simultaneous or concurrent with the delivery, there the lien

[1] See also *Pickman* v. *Woods*, 6 Pick. R. 251. *Clarkson* v. *Edes*, 4 Cowen R. 478. *Christie* v. *Lewis*, 2 Brod. & Bing. R. 416. *The Master, &c. of Trinity House* v. *Clarke*, 4 M. & Selw. R. 288. *Colvin* v. *Newberry*, 8 B. & Cresw. R. 166. *S. C.* on appeal, 1 Clarke & Finelly R. 283.

exists in its full force, and may be insisted on.[1] This doctrine is clearly established; and it especially formed the groundwork of the reasoning in *Yates* v. *Railston*, (8 Taunt. R. 293,) *Christie* v. *Lewis*, (2 Brod. & Bing. R. 410,) *Tate* v. *Meek*, (8 Taunt. R. 280,) *Saville* v. *Campion*, (2 Barn. & Ald. R. 503,) *Faith* v. *East India Company*, (4 Barn. & Ald. R. 630,) and *Gracie* v. *Palmer*, (8 Wheaton R. 605.)

The question, then, in the first place is, whether the present charter-party contains any stipulation incompatible with the notion of a lien; for otherwise it will clearly attach. The only clause bearing upon this point is that, which provides for the payment of the freight "within ten days after her (the schooner's) return to Boston, or, in case of loss, to the time she was last heard of." This latter provision of this clause establishes the fact, that the payment of the freight was not in every event to be contingent on, or subsequent to, the delivery of the cargo; and the other clause by no means carries with it any implication, that the delivery of the cargo shall precede the payment of freight. By our laws the term of fifteen days from the arrival and report of the ship at the Custom-House is allowed for the entry and discharge of the cargo; and in some cases twenty days is allowed.[2] So that an unlivery may be rightfully postponed beyond the ten days after the return of the ship, when by the terms of the charter-party the freight would become due. It is quite remarkable, that the charty-party does not contain any stipulation for the delivery of the homeward cargo, or prescribe any time for its delivery. So that the parties are left afloat, as to this point; and their rights are to be disposed of by the general princi-

[1] See Abbott on Shipp. Pt. 3, ch. 1, § 7, pp. 173 – 178.

[2] See Duty Collection Act of 1799, ch. 128, § 36, 56. Act 3d March, 1821, ch. 180.

ples of law. The question, then, is, whether the claimants could by law insist upon a positive delivery within the ten days after the return of the schooner. I know of no principle of law, upon which that can be generally affirmed. The delivery must be within a reasonable time. But can that be deemed an unreasonable delay, which falls short of the time allowed by the statute law of the country for an unlivery of the cargo? Besides; on what ground can the Court say, that the libellant, if the goods were unlivered, might not insist upon retaining them until the ten days were passed, or payment, or security for payment, of the freight was given? The parties have not stipulated for a delivery of the cargo within the ten days, or for any delivery at all without payment of freight. And in a case of mutual silence on each side on the point, there seems no ground for a Court to say, that a detention for the freight under such circumstances would be inequitable or unreasonable. Lord *Tenterden* in his excellent work on Shipping, (Pt. 3, ch. 1, § 7, p. 177,) has deduced from the cases this general result; that the right of lien for freight does not absolutely depend on any covenant to pay freight on delivery of the cargo. But it may exist, if it appears, that the payment is to be made in cash or bills before or at the delivery of the cargo; or *even if it does not appear, that the delivery of the cargo is to precede such payment.* Now, in the present case, the latter is the very predicament, in which the charter-party leaves this matter.

But the case does not rest merely upon this negative inference. There is an express clause in the charter-party, (as we have seen,) by which the parties bind themselves, the libellant his ship, and the shippers their cargo, to the faithful performance of all and singular the covenants, agreements, and payments of the charter-party. This is a common clause in charter-parties. It is borrowed from the general

Maritime Law, by which the ship is bound to the merchandise, and the merchandise to the ship.[1] *Cleirac* lays it down in express terms; and it is specially declared in the Ordinance of Louis the Fourteenth in 1681, which *Valin* treats on this point, as an affirmance of the general Maritime Law.[2] Lord *Tenterden* in commenting on this clause, after remarking, that this principle of the Maritime Law cannot be carried into effect against the ship in England, from a supposed defect of the Admiralty jurisdiction, at the same time adds, that the owners may be made responsible by a special action on the case at the common law, or by a suit in Equity. He does not, however, treat this clause, as senseless, if it were capable of a specific execution.[3] In another place, commenting on the same clause, he states, as the result of the authorities, (which I shall immediately consider,) that the part of it binding the cargo is inoperative; and that the lien for freight is not derived from it; but is derived from some general principle of law, or some special contract. Certainly the lien is derived from some general principle of law, or some special contract.[4] But the question is, whether this very clause does not constitute such a special contract. I contend, that it does; and that its clear and determinate meaning is, that the cargo shall be responsible (among other things) for the payment of the freight. The words are of this purport; they are sensible in the place, where they occur; they are as much a part of the instrument as any other clause; and it was clearly competent for the parties to enter into such an agreement, if they chose

[1] Abbott on Shipp. Pt. 2, ch. 2, § 5, p. 93. Id. Pt. 3, ch. 1, § 6, (b), p. 169. Id. § 7, p. 170. Cleirac, Us et Cout. de la Mer, p. 72.

[2] Ibid. 1 Valin's Comm. Liv. 3, tit. 1, *Des Charte-Parties*; art. 11, p. 629.

[3] Abbott on Shipp. Pt. 2, ch. 2, § 5, pp. 93, 94.

[4] Ibid. Pt. 3, ch. 1, § 6, (b), § 7, pp. 170, 171.

so to do. If the instrument had expressly declared, that there should be no lien on the cargo for the freight, it cannot be doubted, that the stipulation would have been obligatory upon the parties. That was expressly decided in the late case of *Small* v. *Moates*, (9 Bing. R. 574,) where the judgment turned upon this very point. Now, I profess, that I cannot perceive, what difference there is in legal construction between such language, and the language used in this charter-party. The shipper binds the cargo for the performance of his covenants and payments under it. And what is this but giving a pledge or lien upon the cargo for this purpose? If the party could not enforce that pledge or lien actively by a suit *in rem*, the clause at least furnishes him with a right to detain the cargo until his claim for freight is satisfied. And in the present case, where the parties have been silent, as to the delivery of the cargo without payment of the freight, the clause may, *à fortiori*, be insisted on to repel any presumption, that the parties had waived any lien on the cargo for the freight; for it would not then be bound for the payment. This right of detention under a contract was expressly recognised in *Small* v. *Moates*.

But let us now see, what are the authorities, upon which a different doctrine is maintained. The first case is *Paul* v. *Birch*, (2 Atk. R. 621,) where the charterers had bound the goods to be put on board for the payment of the hire or freight; and afterwards became bankrupts. Lord *Hardwicke* gave full effect to the clause, as against the assignees of the bankrupts. But an attempt was made to charge the goods of third persons, who were shippers under the charterers, with the full amount of the hire or freight. This last claim was resisted; and Lord *Hardwicke* held these latter goods liable only to the extent of the freight payable to the charterers by the shippers. And this is in perfect coincidence

with what is now the established law.[1] So that this case, as far as it goes, does in fact support, instead of impugning the doctrine. The other case is *Birley* v. *Gladstone*, (3 M. & Selw. R. 205,) where certainly a question did arise upon the meaning and effect of the stipulation now under consideration. The question there was, whether the owner of the ship was entitled to detain the cargo, not for freight generally, but for dead freight, that is, for the freight of goods not laden. The Court held, that he was not. Lord *Ellenborough* on that occasion said: "The clause is not familiar to us in England, but has been imported from *Pothier*." (In this his Lordship is certainly mistaken, for it had an existence centuries before.) "It is, like the charter-party, I believe, of French origin; and I know not, whether there may not be some immediate proceeding upon it in that country." Beyond question there is such a remedy in France. But charter-parties did not originate in the French law. They were known in other countries at as early, if not at an earlier period. He afterwards proceeded to say: "I do not say, that a Court of Equity might not afford a remedy to the party under the clause, though there does not seem to be any instance of its being done. But *at law*, what lien is there under it? &c. It is absurd to imagine, that this clause, which cannot be mutually obligatory, was intended to give a lien on one side, without the like remedy on the other, &c. There has been no remedy afforded under it in a Court of Law, and still less by means of actual lien, &c. This is not freight earned within the terms of the charter-party. It falls under the general covenants, either for damage, or for providing a full cargo. But the party cannot have this suppletory remedy

[1] See *Christie* v. *Lewis*, 2 Brod. & Bing. R. 410. *Small* v. *Moates*, 9 Bing. R. 574. *Faith* v. *East India Company*, 4 Barn. & Ald. R. 638.

by way of lien. It would be going too far to hold, that this clause gave him a lien for the non-performance of covenants." The other Judges concurred with Lord *Ellenborough*; but their opinions proceeded on the same grounds as his, and throw no additional light on the subject. The effect, then, of this decision is, that the clause is wholly nugatory and inoperative; that it is *vox, et præterea nihil.* The course of reasoning, by which it is sustained, amounts to this, that because by the law of England an active remedy by a proceeding *in rem* is not provided for in all cases under the clause, therefore no passive remedy by way of lien at law can exist for either party; and that though the language of the parties, binding the property, is clear, they cannot intend it, because there cannot be a mutual remedy, and it would be inconvenient for them to have their property bound for the performance of covenants generally, sounding in damages. I confess, that I cannot understand the ground, upon which such reasoning is to be supported. Where words are sensible in the place, in which they occur in an agreement, they are to be presumed to be used to express the intention of the parties, and to constitute a part of their agreement. They are not to be declared a nullity, because in the opinion of the Court they may lead to inconvenient consequences, which the parties, if they had foreseen, would have guarded against. Courts are to construe instruments, and not make them for the parties. Besides; there is nothing irrational, or in a large sense inconvenient in parties binding their property for the fulfilment of their covenants sounding in damages. If the parties here had respectively said, that the ship and the cargo should stand mortgaged as security for the due fulfilment of the covenants on each side; or that each should have a lien therefor; it would be difficult to find any ground of law

to overthrow such agreement. Indeed, the case of *Small* v. *Moates* (9 Bing. R. 574) instructs us, that such a clause would have been obligatory, and would have created a lien.[1]

The case of *Birley* v. *Gladstone* was afterwards brought into Chancery in order to ascertain, whether there was a lien in Equity under the clause. It is reported in 2 Merivale R. 401. Sir *William Grant* denied any relief, upon the ground, that a Court of Law had already decided, that the clause created no lien; and that the same construction must prevail in Equity as at law; since the lien, if any, was of a legal and not of an equitable nature. On that occasion the learned Judge said: "A court of competent jurisdiction has decided, that neither law nor contract has in this case given any such right. And, without directly contradicting that decision, it is impossible for me to say, that the plaintiffs have a right, &c. It was asked, what effect the clause could have, if it gave no lien, either in law or in equity? A Court of Equity is not bound to find an equitable effect for a clause, merely because the construction a Court of Law has put upon it would leave it inoperative. In truth, it has been copied from foreign charter-parties with very little consideration of the effect, that might be allowed to it by the law of this country. I think it very probable, that in other countries it would have the effect of entitling the ship-owner to retain the cargo for every sort of demand, that would accrue to him under the charter-party. If that be not the effect of it, I do not see, what other effect it can have. But as I am bound by the construction, which it has received from a Court of Law; and conceiving, that this is not a case, in which equity can give a lien, that does not legally exist, I must dismiss the plaintiffs' bill."

[1] See also *Gladstone* v. *Birley*, 2 Merivale R. 402.

Now, in this language of the learned Judge, (and a truly great Judge he was,) I most heartily concur. I put upon the instrument the very construction, which he gives it; and if that be the correct construction, and be the agreement of the parties, where is the principle of the common law, which prohibits giving effect to it, at least by way of a lien or right of detention for the freight? I know of no such principle. And the learned Judge was right in making the suggestion, that the Court of King's Bench did not deny, that such a lien might by the law of England be contracted for. If then the terms of the contract are plain; if they have in the Maritime Law a clear and determinate meaning; it seems to me, that it is the duty of the Court to give effect to that meaning, and to save to the parties the very rights and remedies, which they intended, and the Maritime Law would give them, at least as far as those remedies are within the compass of the common law. I cannot, therefore, assent to the decision in the case of *Birley* v. *Gladstone* in 3 M. & Selw. R. 205. It seems to me utterly unfounded in principle; and I cannot otherwise interpret the language of Sir *William Grant*, than as a disapprobation of it, although he felt himself bound by it. And I find, that the same view of the clause was taken by Mr. Chief Justice *Parker* in *Pickman* v. *Woods*, (6 Pick. R. 252,) where, in delivering the opinion of the Court, he says: "It is most usual (in charter-parties) to stipulate, *that the goods are bound for the freight*, or that freight shall be paid or secured on delivery; and *in all such cases the lien is considered perfect*, notwithstanding there are covenants in the charter-party for the payment of freight." Mr. Chancellor *Kent* manifestly maintains the same doctrine in his Commentaries, as a result growing out of, and in conformity to, the Maritime Law; and few Judges have a better title than he

to speak strongly upon questions of Commercial and Maritime Law.[1]

My judgment, therefore, is, that the clause in question contains an express contract for a lien for the freight in this case; and that if it did not, still that it contains enough to repel any notion, that the delivery of the goods should precede the payment of the freight, or that the lien by the Maritime Law for freight was intended to be waived by the parties. The consequence is, that the libellant is entitled to a decree for the freight against the proceeds now in Court. The decree of the District Court is therefore affirmed with costs.

JOSIAH WOOD, JR. *v.* SAMUEL H. MANN.

The Circuit Courts of the United States are not inferior Courts, in the sense of the common law.

Where the jurisdiction of the Circuit Court depends upon citizenship of the parties in different States, this must appear by proper averment in the record; and if it do not, the omission will be fatal at any stage of the cause.

The exception to the jurisdiction of the Court, by a denial of the fact of citizenship, is of a preliminary nature, and must be taken by plea in abatement, and not by any general answer.

The 23d rule of the Supreme Court in Equity, declaring, "that the defendant, instead of a formal demurrer or plea, may insist upon any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or demurred to the bill," is simply in affirmance of the common practice of Courts of Equity, and applies to matters to the merits, and not to such objections as are in abatement merely.

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[1] 3 Kent's Comm., Lect. 47, p. 220, (2d edition.) See also the elaborate judgment of Judge *Ware* in *Drinkwater* v. *The Cargo of the Brig Spartan*, (3 Amer. Jurist, p. 26,) and *Crane* v. *The Rebecca*, (6 Amer. Jurist, p. 4, &c.) on the same subject.

Where an exception to the jurisdiction was taken in the answer, it was properly struck out, on reference to a master, for impertinence.

Impertinences are any matters not pertinent to those points, which are properly before the Court for decision, at any particular stage of a cause.

BILL in Equity. The answer of the defendant was excepted to for impertinence, and referred to a master, who reported, that the answer, being a general answer to the whole bill on the merits, was impertinent in an allegation, which traversed and put in issue the citizenship of the plaintiff alleged in the bill. The defendant filed an exception to the report on this point; and it was argued by *F. Dexter* and *J. Mason* for the defendant, and by *B. Rand* for the plaintiff.

STORY J. The point now before the Court is, whether the exception to the report of the master is well taken or not. The plaintiff in his bill has alleged, that he is a citizen of the State of New Hampshire, and that the defendant is a citizen of the State of Massachusetts. Upon the bill, therefore, it is clear, that the Court has jurisdiction over the parties in the case. The defendant, however, instead of putting in a plea to the jurisdiction of the Court, denying the citizenship of the plaintiff, has chosen to put in a general answer to the merits, and has prefaced it by a denial of the citizenship of the plaintiff; so that, if this proceeding is correct, upon the replication being filed, testimony must be taken to all the points involved in the answer, as well to that, which regards the citizenship of the plaintiff, as to those, which regard the merits; and the hearing must cover all the grounds in controversy. This course is most manifestly a very inconvenient one, and exceedingly embarrassing to the Court. And the question is, whether the defendant has a title to insist upon it, as matter of right; for, as matter of discretion, to be allowed by the Court, it is impossible, that any Court should voluntarily submit itself to so much embarrassment.

That the denial of the citizenship of the plaintiff is matter proper for a plea in abatement; and that this is the usual form, in which it is brought before the Court, cannot admit of any doubt. Whether, being thus matter properly in abatement of the suit for defect of jurisdiction, it can be insisted on in any other manner, or in any subsequent stage of the cause, is the very hinge of the present controversy. If we resort to the general analogies of law or equity for sources of argument, they seem to establish the general proposition, that matters properly pleadable in abatement cannot be taken advantage of in any other manner than by a plea in abatement. There are some exceptions; but they stand upon very peculiar grounds. There is a peculiar fitness in the application of this principle to cases of pleas to the jurisdiction; for a general answer certainly does, by necessary implication, admit the competency of the Court to entertain the suit between the parties, and to take testimony, and hear it upon the merits. It is true, that if it is apparent upon the face of the record, that the Court has not jurisdiction over the cause, or over the parties, the Court will dismiss it, whether the parties consent to the jurisdiction or not. If therefore the subject matter is not within the jurisdiction of a Court of Equity; or the proper parties are not before it; or the case as made is not fit for the interposition of its authority; and the matters are apparent on the face of the proceedings, the Court will of its own mere motion, in any stage of the cause, dismiss the bill. This is familiar practice in Chancery in many classes of cases; and in the Courts of the United States, it is also familiar in a class of cases, which, owing to their peculiar organization, can rarely occur in other Courts of Equity. The Courts of the United States are Courts of limited jurisdiction; but, as has been often solemnly settled, they are not inferior Courts in the sense of the common law, whose juris-

diction is to be scanned by the niceties applied by the common law to inferior Courts. The Circuit Courts of the United States have no jurisdiction of suits between citizens, unless they are citizens of different States; and not always even then, under the Act of Congress of 1789, ch. 20. In every writ and bill bringing a suit before the Circuit Court, it is, therefore, indispensable to show by proper averments in the record, that the plaintiff and defendant are citizens of different States; and the omission is fatal in any stage of the cause, unless it is cured by an amendment. But where the citizenship is properly averred, the Circuit Courts have complete jurisdiction, unless that jurisdiction is ousted by a denial of the citizenship and proof of the non-existence of the citizenship of either party as alleged. So many cases have been decided upon this distinction, that it has become a general doctrine, as unquestioned in fact, as it is unquestionable in its nature. But notwithstanding the Circuit Court may have the most clear jurisdiction over the parties, still the case or the subject-matter may not be within the proper jurisdiction of any municipal Court in any form of proceeding, or not in the form adopted, either at law or in Equity. In either case the objection is open; and the Court itself will decline jurisdiction and dismiss the suit.

There is a perfect novelty in the present experiment upon the usual proceedings of Courts of Equity. That alone would lead one to doubt of its correctness. The very silence of the practice under such circumstances would be quite significant of what the true rule is. If the course of practice has been to take such an exception by way of plea to the jurisdiction, and not by way of general answer, or in a general answer, it would be difficult to believe, that the right existed, to take it by way of answer, and had never been tried. Upon looking into the books of practice I have not been able to find a single case, in which

the slightest hint is given, that an exception of this nature can be taken otherwise than by a plea to the jurisdiction. It is uniformly stated to be a matter of abatement, and proper for a plea; and it is never alluded to, as having any place in a general answer, or as fit to be allowed to be there. Lord *Redesdale*, in his admirable Treatise on Equity Pleadings (p. 222), treats of it under this head, and this only. So do Mr. *Cooper*, Mr. *Beames*, Mr. *Maddock*, and Mr. *Hinde*.[1] The Orders of Lord *Clarendon* in Chancery manifestly presuppose, that this is the appropriate, and, I may say, the only correct course.[2] Lord *Hardwicke* in *Penn* v. *Lord Baltimore*, (1 Ves. R. 446,) puts the point in the very view, which has been suggested: "To be sure," (says he,) "a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and *answering submits* to the jurisdiction; much more when there is a proceeding to hearing on the merits, which would be conclusive at common law. Yet a Court of Equity, which can exercise a more liberal discretion than Common Law Courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears." And again, in *Roberdeau* v. *Rous*, (1 Atk. R. 544,) Lord *Hardwicke* said, that the defendant should not in that case have demurred to the jurisdiction; for a demurrer is always *in bar*, and goes to the merits of the case; and therefore, that it was informal and improper in that respect; for he should have pleaded to the jurisdiction. Lord *Eldon* in *Iveson* v. *Harris*, (7 Ves. R.

[1] Cooper's Eq. Plead. pp. 238–240. Beames's Eq. Plead. pp. 53, 56–62. Id. pp. 77, 79–87. Id. pp. 88–98. 2 Madd. Ch. Pr. pp. 238, 239–241. See also Lubé's Eq. Plead. pp. 208, 209. Com. Dig. Chancery, I. 1. Hinde's Pr. pp. 170, 171, 195, 214. 2 Hovenden's Supplement, p. 20.

[2] Beames's Orders in Chancery, pp. 172–174.

254,) in effect remarked, that if a defendant in an inferior Court has pleaded to the jurisdiction, he can plead nothing inconsistent with it; and therefore he must not do any thing to give the Court jurisdiction; and if he has waived the objection, or has so pleaded as to make it incompetent to him to stay the proceedings afterwards, the objection is gone.[1] In *Edgeworth* v. *Davies*, (1 Chan. Cas. 41,) an objection, very similar to the present, was taken by way of plea; and the cases there cited show the general practice.

There being, then, a total absence of all direct authority in the case, what are the grounds, upon which the present exception can be maintained? First, it is argued that the 23d rule of the Supreme Court in Equity Causes (in 1822) declares, "that the defendant, instead of a formal demurrer or plea, may insist upon any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill." But this rule is merely in affirmance of the common practice of Courts of Equity, and applies to matters to the merits, and not to such objections as are in abatement merely, and are not proper for a general answer. Again; it is argued, that the Supreme Court have, on various occasions, taken notice of defects of jurisdiction, and of objections thereto, although not taken by way of plea. That is true; but it was, where the matter was apparent upon the record; and not, where the matter was *dehors* the record, and properly to be brought forward by way of plea in abatement. Thus in *Chappedelaine* v. *Dechenaux*, (4 Cranch R. 308,) the question was, whether the citizenship of the parties, as described in the record, gave the Court jurisdiction; not whether that citizenship as alleged was true in fact. The case of *Wormley* v. *Wormley*,

[1] See also *Anon.* 1 P. Will. R. 476, 477.

(8 Wheaton R. 422,) turned merely upon the point, whether the proper parties were before the Court for a decree, it being insisted, that the husband of one of the plaintiffs, (a mere formal party and a defendant,) appeared to be a citizen of the same State as the plaintiff, and so ousted the jurisdiction. In *Osborn* v. *Bank of the United States*, (9 Wheaton R. 858,) the question was, not whether the Court had jurisdiction over the parties to the suit, for that was clear; but whether the State of Ohio was not also a necessary party to a decree, the defendant being a mere nominal party, and the State having the real interest in the suit. It was not, then, a question of jurisdiction, but of proper parties to a final decree. *Breithaupt* v. *The Bank of the State of Georgia*, (1 Peters R. 238,) was a mere question, whether there was a sufficient averment of the citizenship of the parties on the record. The case of *McDonald* v. *Smalley*, (1 Peters R. 620,) can furnish no just precedent. The manner, in which the question came before the Court, was founded upon a local Statute, and the Circuit Court dismissed the bill for want of jurisdiction, upon ascertaining the facts in the mode prescribed by the local law. The objection, therefore, was taken in a peculiar mode, quite irregular indeed, but founded in local practice. In *Conolly* v. *Taylor*, (2 Peters R. 556,) the only question was, whether upon the facts of citizenship as averred in the record, the Court were ousted of jurisdiction. As to some of the parties, defendants, the Court could not exercise any jurisdiction in the State, where the suit was brought; as to others, it could. The bill might be dismissed as to the former, and retained as to the latter. The substantial objection was, that one of the original plaintiffs was a party, who could not sue as plaintiff in the Circuit Court; but this objection was removed by striking out his name as plaintiff, and making him (as might properly be done) a defendant. The

cases, then, which have been relied on in support of the right, totally fail to establish it. They are distinguishable upon clear and admitted principles.

But, if there were no practice, and no authority bearing on the present question, how ought it to be decided on principle? It seems to me, that upon principle it is necessarily of a preliminary nature, and ought, therefore, to be taken by plea, and not by any general answer. So the admitted rule is at common law; and it has been repeatedly recognised by the Supreme Court. Courts of Chancery in many cases, as to pleadings, follow the rules of the common law.[1] And many objections to the jurisdiction of Courts of Equity, which might be taken at an earlier stage, come too late at a hearing of the merits, or after the parties have gone on to proceedings, which presuppose jurisdiction. The rule was recognised in *Underhill* v. *Van Cortlandt*, (2 Johns. Ch. R. 369,) and *Ludlow* v. *Simons*, (2 Cain. Cas. in Err. 56.) There is good sense in the distinction; and indeed the doctrine is less founded in the mere municipal jurisprudence of a single nation, than in the principles of universal law. It is quite as much the law at Rome, as it is in England or America. All pleas to the jurisdiction are objections to entering into the *litis contestatio*; and they must, and ought, therefore, to precede the *litis contestatio*. When the party submits the merits of the case to be heard by the Court on the pleadings and testimony, he admits, that the Court has jurisdiction for the purpose. Until it is ascertained, that the Court has jurisdiction to inquire into the merits, what authority is there to authorize the hearing? Consider for a moment the difficulties in the case now before the Court. The defendant makes a general answer. He requires the Court to examine the

[1] See *Story* v. *Lord Windsor*, 2 Atk. R. 630, 632.

whole merits; he puts at issue all the material grounds of defence; he requires testimony, if they are contested, to be taken to establish them. How can the Court order commissions to take testimony on the merits, if it has no jurisdiction? Until this is firmly established, it has no authority to take a single step beyond the facts necessary to establish it. Suppose the defendant's answer is false in its allegations; or evasive, or insufficient; can the Court proceed to ascertain, whether it is subject to exceptions of this sort, until its jurisdiction is established? Suppose the party after an insufficient answer is in contempt; can the Court proceed to punish him, while the question is yet pending of jurisdiction, or not? So, if the witnesses under the commission refuse to answer to the merits, and are in contempt, are they under the like circumstances punishable? Suppose they swear falsely, are they indictable, if the jurisdiction should be ultimately surrendered upon proofs *in pais*? These, and many other questions may be asked; and I cannot perceive, how they can be satisfactorily answered, if the doctrine of the defendant's Counsel is admitted. When the general replication is filed to a general answer, the proofs must be taken to all the material facts, which are controverted. The hearing must be upon the whole facts. The Court cannot direct proofs to be taken to the single point of jurisdiction in the answer, excluding all other proofs. Such a course is utterly unknown in Chancery. It would overthrow all rules on this subject. I confess myself wholly unable to arrive at any other conclusion, than that upon principle such a mixture of matters in abatement and to the merits is wholly inadmissible. I do not quote the case of *Dodge* v. *Perkins*, (4 Mason R. 435,) as an authority on the point, though, at least to the Judges sitting under that decision, it ought to have some weight, unless they are clearly convinced, that it was erroneous in its

principles. The principle stated in that case, and applicable to the present, was not an *obiter dictum*. It was a question directly before the Court, and formed the very ground-work of the ultimate order made in the cause, giving leave to the plaintiff to amend his bill, and to the defendant to withdraw his answer, and to plead. I know, that the question was then very deliberately considered by the Court; and the position taken was supposed to be one sustained by established principles. In the course of my attendance in the Supreme Court, since that period, I have constantly supposed, when questions of this sort have arisen, that the doctrine was clear. I never have heard it doubted or denied by the Judges; and if it were not, that I dare not trust my memory upon subjects, where decisions in print do not confirm it, I should be inclined to say, that the habit of the Court was, at least by implication, to acknowledge and act upon the doctrine, although there may have been no formal promulgation of it. But if there be no decision in favor of the doctrine, I feel great confidence, that there is none against it. And, upon principle, I have not a single doubt, what the rule is, and ought to be. There is, however, a late case before the Vice-Chancellor, *Chichester* v. *Donegal*, (6 Madd. R. 375,) which appears to me to settle, as far as authority may settle, this doctrine, upon the footing for which I contend. And it is the stronger, because it coincides with the opinion of Lord *Stowell* upon the same point in the Ecclesiastical Court. "I state," (said the Vice-Chancellor,) "without exception, as a general principle, that in Courts of Equity, as well as Courts of Law, a party admitting a fact, which gives jurisdiction to a Court, and appearing and submitting to that jurisdiction, upon general principles and upon all analogies known to us, can never recede, or, as it is called in the Scotch law, *resile*, from those facts, and withdraw that admission." And in the very case,

in which this opinion was given, the only admission was by implication arising from the party's having omitted to plead to the jurisdiction, and entering into proceedings upon the merits of the case.

The remaining question is, whether the exception can be properly taken in this form upon a reference to the master, and a report for impertinence. It does not strike me, that this point is of any serious importance; for if the Court should be satisfied, that the matter was not proper for an answer, and involved inquiries, not in that stage of the cause open to litigation, I have no doubt, that it would be the duty of the Court, as a matter of self-protection, to suppress it. It is a great mistake to suppose, that, if the parties do not object to a matter, the Court are bound to entertain cognizance of it, and to decide it.

But is this matter of impertinence or not? It is argued, that it is not, because it does not answer the description given by Gilbert in his "Forum Romanum," (p. 209,) where he says, that "Impertinences are, where the records of the Court are stuffed with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the point in question;" and he then proceeds to illustrate it by instances. Doubtless such matters, as he states, are impertinences. But they are not the only matters of this sort, even if the generality of expression in the latter part of the sentence, as to immaterial facts, would not (as I am not prepared to admit) cover the present case. Impertinences are, as I conceive, any matters not pertinent or relevant to the points, which, in the particular stage of the proceedings, in which the cause then is, can properly come before the Court for decision. If the cause is at issue upon a general answer, purporting to be to the merits, any matter not going to the merits is properly to be deemed an impertinence.

Lord *Clarendon's* Orders[1] put this matter in a clear light. Counsel are to take care, (says the Order,) that the bill, answer, or other pleading "be not stuffed with repetition of deeds, &c., *in hæc verba*; but the effect and substance of so much of them only, as is pertinent and material to be set down, and that in brief terms, without long and *needless traverse of points not traversable*, (that is, as I conceive, not traversable in that stage of the cause,) tautologies, multiplication of words, or *other impertinences*, occasioning needless prolixity," &c. The cases of *Narmey* v. *Tothy*, (11 Price R. 117,) and *Wagstaff* v. *Bryan*, (1 Russell & Mylne R. 28,) appear to me to be very closely in point, as to this very matter of impertinence.

It may be added, that the 22d section of the Judiciary Act of 1789, ch. 20, manifestly contemplates matters declinatory of the jurisdiction to be in abatement, and to be taken advantage of by way of plea. It provides, that no writs of error shall be sustained and reversals had (and appeals are governed by the same regulations) for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, or such a plea to a petition or bill in Equity, as is in the nature of a demurrer.

Upon the whole, my opinion is, that the master's report is correct; that the exception to it ought to be overruled, and the report to stand confirmed accordingly; and the allegation to be struck out from the answer for impertinence.

Decree accordingly.

[1] Beames's Orders in Chancery, pp. 165, 166. Id. p. 167 and note 6. See Mitford on Eq. Plead. p. 318.

APPENDIX.

OPINION OF JUDGE DAVIS.

[The present opinion was given by Judge Davis in the District Court, in the case which was afterwards heard on appeal by Mr. Justice Story, and which appears in the present volume of Reports under the name of *The Brig George, Joseph Westcott and others Claimants*, (ante p. 151).]

DISTRICT COURT OF THE UNITED STATES.

MASSACHUSETTS DISTRICT, JANUARY 14TH, 1831.

WILLIAM LAMSON, LIBELLANT, *v.* JOSEPH WESTCOTT AND OTHERS.

Benjamin R. Nichols, Proctor for libellant.

C. P. Curtis, Proctor for respondents.

DAVIS J. This suit is for the recovery of wages, alleged to be due to the libellant as mate of the Brig George, Daniel Dennison late master, in a voyage from Boston to St. Jago in the Island of Cuba, and back to the United States, of which vessel the respondents are owners. The voyage was duly performed by the libellant, and there is no dispute, as to the earning of the wages demanded; but the respondents contend, that the amount of wages is exceeded by what they consider their rightful demand, which they introduce as a *set-off*, being the amount paid, at St. Jago, by their agent for expenses incurred by the libellant's sickness at that place. Those expenses are for his

Board, fifteen days, . . .	$30·00
Washing	1·00
Apothecary's bill	13·25
Doctor's bill	25·00
Four bottles of Madeira wine .	5·50
	$74·75

The vessel was furnished with a medicine-chest with directions, pursuant to the requirements of the Act of Congress, for the government and regulation of seamen in the merchants' service, passed July 20th, 1790, extended to the West-India trade by the Act of March 2d, 1805, by which, it is contended, the master and owners are exempted from the charge of medicine, and medical advice and assistance; and as to the considerations, which, in ordinary cases, exempt a sick seaman on shore from the other expenses specified in the account, it is argued, that they are not applicable to this case. At the time when the libellant was put on shore, the vessel was about proceeding to another port, in the Island of Cuba, to take in part of her cargo, under the command of the libellant, Captain Dennison having died, the day before, of the *yellow fever*. The libellant was at that time ill, with symptoms of the same disorder. He, however, got the vessel under way; but, from his increasing illness, and the urgent advice of the pilot, he decided on going on shore, considering it the most prudent step to be taken, not only for his own relief, but for the safety of the crew. He took with him, from the medicine-chest, such articles as were thought best adapted to his case. The vessel departed, under the charge of the pilot, and it was expected she would return in about a week. She did not return, however, until fourteen days had elapsed from the time of her departure, when the libellant had so far recovered, that he resumed his station on board the vessel, returning to the United States under the command of another person. It is said, in reference to this state of facts, that the libellant caused himself to be put on shore *unnecessarily*; that he was unreasonably alarmed at his situation; that it is doubtful whether he had the yellow fever; and that there were circumstances, known to the libellant, from which he might reasonably have inferred, that Captain Dennison, if he died of the yellow fever, did not receive the disorder in the ordinary way of contagion, but that his disorder was introduced by a too free indulgence in the use of ardent spirits. In regard to the last mentioned particular, the conduct of the libellant, in circumstances appearing in evidence, manifests a decision of character, and a prudent regard to the best interest of his employers, which should go far to shield him from the charge of precipitation, or timidity, or of indifference to the duties of his station. The Captain's sickness, however, excited and inflamed by the causes suggested, was undoubtedly a case of *yellow fever*. That the libellant was seized with the same alarming disorder, appears altogether probable, not only from his own apprehensions, but from the decided opinion expressed by the pilot, who accompanied his pressing advice to the libellant to leave the vessel, with intimations of the most alarming character, as to his fate, if he should continue on board. Under these circumstances, I cannot but think the libellant's conduct justifiable. The step which he took being the result of his own decision, he has been requested to give satisfac-

person, the same course would probably have been directed. It is further urged, that, admitting the leaving of the vessel to have been justifiable, the libellant succeeding to the command after the death of Captain Dennison involves all the incidents of that station, and that, whatever may be the claims of a *seaman*, as to the expenses of sickness, they cannot be maintained by a *master*. This position cannot, I think, be maintained on legal or reasonable grounds. Whatever the libellant was entitled to as *mate*, is not lost or extinguished by his duties as *master* of the vessel, afterwards casually superinduced by the death of the original master. The libellant, if he had acted as commander for the whole residue of the voyage, after the death of Captain Dennison, would still have a right to sue in Admiralty for his wages, as mate for the whole voyage; taking some other proper remedy for any increased compensation for his services as master. We have a decided case to this purpose in Robinson's Admiralty Reports; and the principles, on which that decision proceeded, would secure to him the privileges he might be entitled to in his capacity as mate, and, among the rest, whatever exemption he might claim in that capacity from the expenses of sickness in the course of the voyage. In this view I shall consider his case, and it remains to inquire, whether he be bound to sustain the bill of charges, which the owners of the vessel have paid for his sickness at St. Jago, under the circumstances which have been stated. By the rules and principles of Maritime Law, as existing independent of the Statute of the United States, which has been mentioned, he would not be thus liable; but such expenses would fall on the owners. There may have been doubts formerly, and probably such doubts existed when that Statute was framed, as to the liabilities in such cases, and whether some portion, at least, should not be borne by the seaman. Some of the old codes, usually resorted to, as guides in such questions, would seem to favor such apportionment. There are other regulations, however, on this subject, more modern and better adapted to the present times, which in express terms direct, that a *seaman falling sick* shall be cured at the *expense of the ship*; and this is decidedly declared to be the rule of law on the subject by the Circuit Court in Maine, in the case of *Harden* v. *Gordon*, (2 Mason R. 541,) with such modifications and exceptions only as the Act of Congress, which I have mentioned, has established. The terms of the Statute are, that the vessel "shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same, or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine-chest, so provided and kept for use, the master or commander of such ship or vessel shall provide for and pay for all just *advice, medicine, or attendance* of physicians, as any of the crew

shall stand in need of in case of sickness, *at every port or place*, where the ship or vessel may touch or trade at during the voyage, without *any deduction from the wages* of such seaman or mariner." The application of this Act to the various cases occurring, has, as Mr. Justice *Story* observes, been attended with no little embarrassment and perplexity, to the minds of those Judges who have been called to decide on the questions which have arisen. Their difficulties are happily in a great degree relieved by his elaborate and able opinion in that instructive case. The points therein expressly decided go far to settle this case. In the first place, whatever may be the operation of the Statute, as to *advice, medicine, and attendance of physicians*, it is determined, that the *other charges of sickness* are unaffected by its provisions; and, in regard to *medicines*, it is held, that the provision manifestly contemplates, that the sick seaman is on board the ship, or in a situation to command the use of the medicine-chest and directions; " and that it cannot therefore be intended to apply to cases, where the seaman is removed on shore, and is deprived of these benefits. To him the non-existence of the medicine-chest, and the incapacity to obtain the use of it, are precisely equivalent. Whenever, therefore, the sick seaman is removed ashore for the convenience of the ship, whether with his own consent or without it, if he does not draw his medicines from the chest, he is entitled to an allowance equal to his expenditure for medicines." These principles, thus distinctly and emphatically announced, are clearly applicable to the case in question, and, yielding to their authority, as well as to my conviction of their reasonableness and solidity, I cannot but reject the respondents' charges for *board and washing*, and for the *medicine* included in the account. Under the head of medicine, I consider the *Madeira wine*, that was furnished, to be comprehended.

It remains to determine, by which party the *physician's bill* shall be sustained. It does not appear by the report of the case of *Harden* v. *Gordon*, whether a *physician's bill* were included in the demand. If it were, and were disallowed, we must infer, that it would have been distinctly noticed, with reasons assigned for its disallowance, especially as its kindred charge, *(medicine,)* is expressly sustained. I am, therefore, to proceed, in this particular, without the valuable and desirable precedent, of which I should have had the benefit, if an opinion on the physician's bill had been given in that case. I have endeavoured to give to the subject every just attention, and to adopt such an interpretation of the Statute, that it may, according to the approved rules of law, have a reasonable effect, agreeably to the intent of the Legislature. The Act charges the master, and through him, it is conceived, the owner of the deficient vessel, with the whole amount incurred for *advice, medicine, and attendance of physicians* at every port or place, where the ship or vessel may touch or trade during the voyage, *without any deduction* from the wages of the sick seaman, or mariner, in default of *having on board, so provided and kept fit for use*,

a medicine-chest, with accompanying directions, pursuant to the provisions of the Statute. It is not expressed, that he shall be free from all such charge in case of compliance with that injunction. But it is obviously implied, that an allowance and benefit of this description must have been intended, either by way of *inducement*, if the owner were considered before liable to such charges by the general Maritime Law, or as a *penalty*, if he were viewed by the Legislature as not thus liable, by the general law on the subject. Unless this be admitted, the law would be without sanction. Cases, however, may be readily supposed, which would not be within the true meaning and intent of the law, though coming within its terms. In reference to the object of the law, we must suppose, as is remarked by the learned Judges, who have commented upon it, that a benefit to the seaman was intended to be conferred. The requisition, it is believed, is peculiar to our country, and it certainly is of estimable value. Our seamen, doubtless, often find relief and comfort from the execution of its requirements, when at sea, especially in long voyages. Still they would pay too dearly for such accommodations, if, in every case requiring medical aid, in *port*, often in very unhealthy climates, the whole expense of such aid, excepting what was derived from the medicine-chest and directions, should be deducted from their hard earnings. The regulation is, in my opinion, limited to the ordinary cases of illness *on board the ship*, a sickness of such a character, that the patient may be and is kept on board, and receives, or may receive, the benefit of the medicine-chest, and the directions, and the advice and assistance of the master of the ship, or some other competent person attached to the ship, in the application of the medical directions accompanying the chest, and such nursing and attendance, as the situation of the ship may admit. When the circumstances of the case, and especially the hazard arising from a malignant and contagious disorder, render it necessary or expedient to put the patient on shore, not merely for his greater benefit, but for the general interest of the voyage, there is presented a case, which is not within the fair meaning of the Statute, and must be governed by the general principles of Maritime Law, applicable to the circumstances of the case. There is a class of cases, that might be mentioned, coming within the general aspect of the law, and yet not within its fair intent. Such are the cases requiring *surgical skill* and assistance, a dislocation or a fracture, in which the medicine-chest and its directions, with all the assistance and intelligence of the master or of any one belonging to the ship, would be of no avail. Such disasters are not unfrequent in the various manœuvres on board a ship. That the unfortunate subject of them shall be cured at the expense of the *ship* is expressly provided in all the Marine Codes, old and new, and in a distinct article from the provisions respecting seamen falling *sick*. It may be reasonably doubted, whether it was intended to repeal the general law on this subject, in such a contingency, by the provision respecting a medicine-chest, from

which, from the nature of the case supposed, the sufferer could have no relief. This supposition, however, is introduced merely by way of illustration. It is not the case before me, and, of course, what has been said on that head is to be taken with all the reserve, that will leave the mind free to proceed in another direction, when an actual case of this description shall be brought before the Court, and be properly discussed and considered. The line which I should draw on this subject is, that the operation of the Act, as to the sick seaman's liability to expenses of medicine and medical advice and assistance, is specially applicable to sickness *on board the ship*, and is not applicable to the cases, in which the sick seaman is *put on shore*; especially when such disposition of the patient is induced from hazard to the rest of the crew, if he should remain on board, or from other motives having reference to the general interest of the voyage, or, as Mr. Justice *Story* expresses it, *for the convenience of the ship*. The circumstances of this case bring it, in my opinion, within the range of this qualification. I am not prepared to say, what should be the result, where the removal of the patient is merely for his benefit or comfort, without any apparent motive of reasonable urgency in reference to the general interest or convenience of the ship. I include the *physician's bill*, because it is obviously the intent of the Act, that the sick seaman should have *medical aid*, as well as *medicines*; for this purpose the apothecary's *directions* are required; and it is doubtless to be understood, though not expressed, that the patient, in their use and application, is to have some assistance. The sick seaman cannot do this himself. A duty of this description, (and a delicate and difficult one it often must be,) necessarily belongs to the *Captain*. It may often be inadequate, but it is what the law provides; and in most instances, probably, the health of the crew is well preserved under these regulations, especially as the arrangement must naturally prompt to a degree of attention to the subject, on the part of the master, which might not be exercised if cases of sickness were to be devolved upon physicians and nurses. The master is to be the *physician* in such case; the ship is the *hospital*; and if the patient be removed to *another hospital* or habitation on shore, without medicine and without a *physician*, which he is, when not accompanied by the medicine-chest, the directions, and the master or some competent person to apply the directions and medicines to his case, the want is to be supplied in the best manner, that circumstances will admit. The sick seaman is not to sustain the expense of the substitution for what the law has provided he should have on board the ship *free of expense*, it being always understood, that the patient is *without fault*, meaning by this intimation such fault or culpability in incurring disease, that the law places the extra expense to his account.

Decree, $54·50 and costs, being the amount of wages, without deduction on account of expenses paid by the respondents, as exhibited by their account.

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